TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 600

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

vs.

J. L. POWE, AS ADMINISTRATOR OF GEORGE A. MARSHALL, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

PETITION FOR CERTIORARI FILED DECEMBER 16, 1930

CERTIORARI GRANTED JANUARY 19, 1931

(35,522)

(35,522)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 600

ATLANTIC COAST LINE RAILROAD COMPANY, PETITIONER,

vs.

J. L. POWE, AS ADMINISTRATOR OF GEORGE A. MARSHALL, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

INDEX

	Original	Print
Proceedings in supreme court of South Carolina	1	1
Caption (omitted in printing)	1	
Record from court of common pleas of Charleston County	3	1
Statement	3	1
Complaint	5	2
Answer	9	5
Statement of evidence	12	8
Testimony of Mrs. Sallie T. Marshall	12	8
St. Julian Melchers	16	11
John McCrady	19	14
J. J. Mansfield	24	17
C. A. Rice	27	20
Dr. J. L. Powe	29	21
L. L. Brown	37	28
J. A. Manning	38	28
A. C. Kleckley	45	34
C. C. Tyner	49	37

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 6, 1931

INDEX.

	Original	Print
Offers in evidence—Excerpt from answer	56	42
Circulars of South Carolina Railroad Commission	57	43
Motion for directed verdict	58	44
Charge to jury	59	45
Defendant's exceptions	73	56
Petition for stay of judgment	77	59
Order staying judgment	79	60
Bond on stay	81	61
Opinion, Graydon, J	83	63
Dissenting opinion, Cothran, J	92	78
Præcipe for transcript of record	104	95
Clerk's certificate	105	96
Order allowing certiorari	106	97

[fols. 1 & 2] [Caption omitted]

[fol. 3]

IN COURT OF COMMON PLEAS OF CHARLESTON COUNTY

STATEMENT

This action was commenced in the Court of Common Pleas for Charleston County by service of summons and complaint on the defendant, which was filed in the office of the Clerk of Court for Charleston County on 30th May, 1924. The action was commenced in the name of C. M. Tyner as administrator of the estate of George A. Marshall, as plaintiff. C. M. Tyner subsequently died and by order dated 19th September, 1929 J. L. Powe who was appointed administrator of George A. Marshall, was as such administrator substituted as plaintiff.

It is alleged in the complaint and admitted in the answer that the action is brought under the Federal Employers Liability Act and amendments thereto.

The complaint alleges that plaintiff's intestate, George A. Marshall, was injured and killed on 16th January, 1923 while in the performance of his duties as a switchman employed by the defendant, by reason of the negligence, carelessness, recklessness, wilfulness and wantonness of the defendant in the particulars as set out in the complaint as hereinafter printed. The defendant duly answered denying liability and setting up as a defense the orders of the Railroad Commission of South Carolina of the 24th May, 1916 and October 11, 1916, as hereinafter set out in the testimony, and that it had complied with the regulations, and also setting up that the injuries and death of the said George A. Marshall were due to and caused by one of the risks of his employment assumed by him, and further pleading contributory negligence.

[fol. 4] The case was first tried on October 10, 1925 and a verdict for $28,800.00 rendered for the plaintiff, which was affirmed by the Supreme Court of South Carolina, and which was subsequently reversed by the Supreme Court of the United States and sent back for a new trial, and the case was again tried on the 7th, 8th and 9th of October, 1929, when a verdict for $30,000.00 in favor of the plaintiff was

rendered, upon which judgment was entered on the 5th December, 1929.

The defendant objected to certain of the testimony offered by the plaintiff, especially to the admission in evidence against it of the seventh article of its answer. The defendant at the close of all the testimony moved for a directed verdict on the grounds hereinafter stated, which motion was overruled. After arguments of counsel and the Judge's charge the jury retired to deliberate and returned a verdict in the plaintiff's favor for $30,000.00.

Thereafter within the time allowed by law the defendant served due notice of intention to appeal and also this transcript of record and the exceptions hereinafter set forth.

The pleadings allege and admit that both the deceased and the defendant at the time of the death of the decedent, were engaged in interstate commerce. At the time of his death George A. Marshall was employed by the defendant railroad company in the capacity of switchman and on the 6th day of January, 1923 that he met his death while in such employment. It was also admitted that he left surviving him as his sole heirs at law and distributees, his widow, Sallie T. Marshall, and three minor children, Ruby E. Marshall then five years old, James A. Marshall then [fol. 5] three years old, and George A. Marshall, Jr. then nine months old.

It was admitted in the trial that J. L Powe was the duly appointed administrator of the estate of said George A. Marshall and appeared in this action as such.

The pleadings also allege and admit that the defendant is and at the times therein mentioned was a railroad corporation organized and existing under the laws of the State of Virginia, and doing business in the county of Charleston, state aforesaid, and as such engaged in interstate commerce.

In Court of Common Pleas of Charleston County

Complaint

The complaint, leaving out the formal allegations already covered above and the caption, is as follows:

"Third. The defendant above named, Atlantic Coast Line Railroad Company, is now and at the time hereinafter

mentioned was a railroad corporation organized and existing under the laws of the tate of Virginia, and doing business in the county of Charleston, state aforesaid, and as such engaged in interstate commerce; and that the said George A. Marshall, while an employee of said railroad corporation as aforesaid, and while engaged in the duties incident to and growing out of his employment in running and operating one of defendant's trains engaged in interstate commerce, met with an accident at or near the city of Charleston, state aforesaid, on the 5th day of January, 1923, and was so badly injured as to cause his death soon thereafter.

"Fourth. That this action is brought against defendant, Atlantic Coast Line Railroad Company, under and pur-[fol. 6] suant to the provisions of the Federal Employers Liability Act (1908) and as amended.

"Fifth. On information and belief, that on said 6th day of January, 1923, said deceased, George A. Marshall, was engaged in the performance of his duties as a switchman attached to an engine and train of cars moving over defendant's main line of tracks at or near the city of Charleston, state aforesaid, and in the direction of said city; that it was dark and foggy, the time being about three o'clock in the morning; that while proceeding as aforesaid at or about Five Mile Crossing, near said city the said engine and train of cars were caused to be stopped by reason of trouble with the brakes on some of said cars, and that the said George A. Marshall in the course of his duty and employment got down to the ground to examine into and correct said trouble; that at or near the point where said engine and train of cars had stopped as aforesaid, defendant herein Atlantic Coast Line Railroad Company, its agents and servants, in violation of its duty to furnish for the use of the said George A. Marshall a reasonably safe roadbed and track free from obstructions which might be placed on the side of the track, and to place and maintain signal devices at a reasonably safe distance from the track, so as not to extend over towards the track in such close proximity as to endanger the lives of its employees who might be running or operating its trains by said signal devices, had placed and maintained a signal device or obstruction too close to the track, and in such close proximity to the track as to

leave an insufficient space intervening between it and the side of the train, and so close as to interfere with the proper operation of defendant's trains and the proper performance of their duties by its employees thereabout, so that [fol. 7] upon said train proceeding forward, and while the said George A. Marshall was mounting the ladder of one of the cars attached or while he was examining the defective car as aforesaid, the defects in which were due to the negligence of the defendant herein, thereby necessitating that said decedent examine the same, and while thus engaged in the duties incident to his employment, he was struck by said signal device or obstruction and thrown from his train and so badly injured as to cause his death soon thereafter.

"Sixth. That the injuries and death of the said George A. Marshall were caused by the negligence, carelessness, recklessness, wilfulness and wantonness of said defendant, Atlantic Coast Line Railroad Company, its agents and servants, as aforesaid, and in the following particulars, to wit:

"(a) In failing and omitting to furnish the said decedent a reasonably safe place to work.

"(b) In failing and omitting to furnish a reasonably safe roadbed and track free from obstructions.

"(c) In failing and omitting to place and maintain said signal device at a reasonably safe distance from the track.

"(d) In causing and allowing said signal device or obstructions to be placed and maintained too close to the track.

"(e) In causing and allowing said signal device or obstructions to be placed and maintained in such close proximity to the track as to leave insufficient space between it and the side of a train within which employees might safely perform the duties incident to their employment and the [fol. 8] proper operating of defendant's trains.

"(f) In causing and allowing said signal device or obstruction to be at the point, place and position the same was maintained.

"(g) In failing and omitting to notify or warn said decedent of the close proximity of said signal device or obstructions to the side of the train.

"(h) In causing and allowing a defective and bad order box car to be attached to and form a part of the train and to be transported by the engine to which decedent was attached.

"(i) In causing and allowing said engine and train of cars to be run at a high and dangerous and excessive rate of speed within the yard limits and block system of defendant and in violation of its rules and regulations governing the same.

"Seventh. That at the time of said accident and death of the said George A. Marshall, he was a married man and left surviving him his widow, Sally T. Marshall, and the three minor children heretofore named, all of whom were dependent upon said decedent for their support and maintenance; that said decedent at the time of the happening of said accident was earning one hundred and eighty ($180.00) dollars per month, was a young man of 25 years, strong, healthy and able-bodied, was kind and affectionate to his wife and children, and by reason of the negligent killing of said decedent his wife and children have suffered a great pecuniary loss.

"Eighth. That by reason of the aforesaid facts and injury and death of the said decedent, his wife and children have been injured in the sum of fifty thousand ($50,000.00) dollars."

[fol. 9] IN COURT OF COMMON PLEAS OF CHARLESTON COUNTY

ANSWER

The answer of the defendant, leaving out the caption, was as follows:

"First. It admits the allegations of the first, third and fourth paragraphs, and so much of the second paragraph as alleges that the said decedent, George A. Marshall, on the 6th day of January, 1923, and for some time prior thereto, was employed by the defendant railroad company in the capacity of switchman.

"Second. It denies each and every other allegation in said complaint not hereinabove or hereinafter specifically admitted.

"Third. Further answering said complaint and with specific reference to the subdivisions a, b, c, d, e, f and g in paragraph sixth of the complaint, and the other allegations in the complaint referring to the semaphore hereinafter mentioned, the defendant alleges that heretofore, to wit, on or about the 24th day of May, 1916, the Railroad Commission of South Carolina in Circular No. 211, amending Circular No. 208 with regard to clearances, unanimously adopted the following resolution:

" 'Taking into consideration not only the safety of the general public and employees of the railroad, but for the further consideration that it is absolutely necessary for all railroad employees to give and receive signals;

" 'Be it resolved that no building, or platform, or other obstruction be allowed erected or maintained nearer than four feet of the outer edge of the nearest rail of the main or side track of any railroad in the State of South Carolina. This limit of clearance shall not apply to bridges already [fol. 10] constructed, or to passenger station landings.'

"A copy of which was served upon the defendant by said Railroad Commission; also, that on or about October 11th 1916, the Railroad Commission of South Carolina in Circular No. 216 with regard to clearances, adopted the following resolution:

" 'Taking into consideration not only the safety of the general public and employees of the railroad, but for the further consideration that it is absolutely necessary for all railroad employees to give and receive signals:

" 'Be it resolved that no building, or platform, or other structure about station grounds be allowed erected or maintained nearer than four feet from the outside edge of the main or side track of any railroad in the State of South Carolina, measurement being made at rail top level; and furthermore, that no obstruction be allowed erected or maintained at any point other than station grounds nearer than four feet from the outer edge of the main or side track rail of any railroad in the State of South Carolina, measurement being made four feet about the top of the rail.

" 'This limit of clearances shall not apply to bridges already constructed, or to passenger landings.'

"A copy of which was also served upon this defendant by the said Railroad Commission.

"Fourth. That this defendant complied with the terms of the said resolution in the erection of the semaphore mentioned in the complaint, the same being at a greater distance than four feet from the outer edge of the n-arest rail of the track at the point as so required.

[fol. 11] "Fifth. Further answering said complaint and for a further defense to the said action, on information and belief the defendant alleges that the injuries and death of the said George A. Marshall was due to and caused by one of the risks of his employment assumed in working for the defendant, that is to say, the risk of riding on the side of a freight car and of passing various obstructions such as signal devices, semaphores and the like, whose presence was known to him and the dangers of which were obvious and so assumed by him.

"Sixth. Subject to defendant's motion to strike out certain allegations of the complaint with reference to defects in certain of the freight cars on the said train mentioned in said complaint, and subject further to its motion to make said allegations more definite and certain, in various particulars, and saving and reserving all its rights under said motions, and further answering said complaint and for a further defense to said action, on information and belief, the defendant alleges that the injuries and death of the said George A. Marshall were due to and caused by one of the risks of his employment, assumed in working for the defendant, that is to say, the risk of the work of a switchman about cars, with defects arising in the ordinary operation of the cars the occurring of such defects in such operation being reasonably in the contemplation of the parties when the deceased undertook to work for the defendant, and said defects in this case being obvious and actually known to the deceased and ordinarily incident to his employment.

"Seventh. Further answering said complaint, and for a further defense to said action, this defendant alleges that the injuries and death of the deceased were due to and caus-d by the negligence of the said deceased contributing [fol. 12] and combining and concurring with the alleged negligence of the defendant and constituting a proximate

cause thereof, without which the same would not have happened, in the following particulars, to wit:

"(a) In not going directly to the roof of the freight car on which he was riding as instructed by the conductors of said train, but in remaining on the side of the car, contrary to said orders and instructions.

"(b) In not keeping a proper lookout for the signal devices and other obstructions which are ordinarily erected on the side of tracks of the defendant, near said tracks.

"(c) In failing and omitting to keep a proper lookout for the semaphore mentioned in the complaint herein, whose presence and location were well known to the deceased.

"(d) In leaning outward from the ladder of said freight car so far as to bring his body in contact with the said semaphore erected at a greater distance from the track than is required by the regulations of the South Carolina Railroad Commission, hereinbefore set forth."

IN COURT OF COMMON PLEAS OF CHARLESTON COUNTY

Statement of Evidence

The plaintiff introduced the following testimony:

Mrs. SALLIE T. MARSHALL sworn.

Q. What is your name?
A. Sallie T. Marshall.
Q. Was Mr. George A. Marshall your husband?
[fol. 13] A. Yes, sir.
Q. When was he killed?
A. In 1923.
Q. What month?
A. January the 1st.
Q. How long had you been married to him before his death?
A. Six years.
Q. How old was he when he was killed?
A. 27.

Q. What was the state of his health when he was killed?
A. He was in perfect health.
Q. What was his weight?
A. About a hundred and sixty pounds.
Q. How many children have you?
A. Three.
Q. What are their names?
A. Ruby, James and Alton.
Q. How old are those children now?
A. Ruby is ten, James is nine and Alton is six.
Q. One of these little ones was born after the death of his father?
A. Yes, sir, the baby.
Q. What were your husband's wages at the time of his death?
A. About a hundred and eighty dollars a month.
Q. What did he do with his salary?
A. He always brought his check to me.
Q. He gave you his wages?
A. Yes, sir.
Q. Was he a good provider?
A. Yes, sir.

[fol. 14] Cross-examination:

Q. How long had you and Mr. Marshall been living in Charleston?
A. We were not here but three weeks when he was killed, we were here twice, the last time we did not live here but three weeks.
Q. He was working for the railroad?
A. Yes, sir.
Q. He was working steadily those three weeks?
A. Yes, sir.
Q. What was his work for the railroad?
A. Switchman.
Q. Where did he work, on the yard here?
A. Yes, sir, he worked on the yard but he was called off on a wreck.
Q. He worked between Charleston and Bennetts?
A. No, sir, he worked in Charleston but he was called off that night on a wreck when he got killed.
Q. He had worked for the railroad here before?
A. Yes, sir.

Q. How long?

A. I guess about three months, something like that.

Q. He was here from March to June?

A. Yes, sir.

Q. And he worked for the Atlantic Coast Line as a switchman all that time?

A. Yes, sir.

Q. He had been a railroad man at other times for the Coast Line?

A. No, sir, he never did work for them but twice, he worked in Florence.

Q. He worked twice here and in Florence?

A. Yes, sir.

[fol. 15] Q. How long did he work in Florence?

A. About two years.

Q. What was he doing there?

A. Switchman.

Q. For the Atlantic Coast Line?

A. Yes, sir.

Q. You say he made about a hundred and eighty dollars a month?

A. Yes, sir.

Q. Part of that he had to spend on his own living, buying his clothes and food?

A. Yes, sir.

Q. About how much of that did he give you for *you for* your support?

A. After he got his clothes he turned the rest over to me.

Q. It cost something to support him?

A. About thirty or forty dollars a month after he took out his he turned me over about thirty or forty dollars.

Q. Was that each week?

A. No, sir, a month.

Q. He turned over to you about thirty or forty dollars a month?

A. Yes, sir.

By the Plaintiff:

Q. That was after he paid the bills for the family he turned over thirty or forty dollars a month to you?

A. Yes, sir.

[fol. 16] ST. JULIAN A. MELCHERS sworn:

Q. Where do you live?

A. Charleston, S. C.

Q. What is your occupation?

A. Photographer.

Q. How long have you been a photographer?

A. About 35 years.

Q. At my request did you make some pictures of a semaphore on the Atlantic Coast Line R. R.?

A. Yes, sir.

Q. Will you look at these pictures I hand you and tell me if you made that picture?

A. Yes, sir, I made it.

Q. Is that semaphore 3911?

A. Yes, sir.

(Picture offered in evidence marked Exhibit A.)

Q. Look at that picture and tell me what that is?

A. That is looking south, the south bound track, the Coast Line track, the train here and the signal light there.

Q. Is that picture the same as shown in the other picture?

A. Yes, sir.

(Picture offered in evidence marked Exhibit B.)

Q. Look at that picture, what is that?

A. That is also 3911 signal post.

Q. What does that show?

A. Inbound Coast Line track giving the measurements on there.

Q. Did you make the measurements?

A. Yes, sir, I made these measurements, that is from base of signal post to outside rail four feet ten inches, base of signal post to outside cross ties three feet two inches, the [fol. 17] camera one hundred and fifteen feet from signal post, standing on the Coast Line track looking south from outside rail to top of base of signal post four feet 9 inches, outside cross ties to top of signal base three feet one inch.

Q. That is the Coast Line track there?

A. Yes, sir.

Q. What is this?

A. This is signal post 3901.

Q. Where is that signal post located with regard to signal post 3911?

A. This is about a mile north of that.

Q. North of 3911?

A. Yes, sir.

Objected to; that is another semaphore entirely.

(Picture offered for identification and marked Exhibit —.)

Cross-examination:

Q. When did you take those pictures?

A. September 11th, 1925.

Q. Now this picture showing the train of cars that was taken from what track, the Southern track?

A. I would have to see that to tell you, that is looking south.

Q. There are four tracks there?

A. I believe there are.

Q. Are not there two Southern tracks and two Coast Line?

A. Yes, sir.

Q. Which track were you on when you took this photograph, what was, or where was your camera located?

A. That is looking south, inbound track, train is passing [fol. 18] on the Coast Line track, I was standing right between the two tracks; I mean the Coast Line and the other of these, this is the Southern, I am standing on this track here, I had to move aside when this train came, I was over here at first and when this train was coming I had to get off and keep the focus and I moved over towards the Southern track.

Q. Your camera was between the Southern and Coast Line track?

A. Yes, sir, I am also on the track between those two, the train was coming and I had to get over.

Q. Are you not on the second Southern track?

A. From this angle I could not very well be.

Q. You were between the two Southern tracks?

A. Yes, sir.

Q. You crossed this Southern track?

A. Yes, sir, I was between the two Southern tracks.

Q. It made it quite an angle, how far off were you?

A. About a hundred and fifty feet I judge, this train was coming and I had to work pretty fast.

Q. Were you not standing on the south bound Southern track to make this picture, did not you say that the last time?

A. That has been 6 years ago, I can't remember.

Q. You would be more apt to be accurate at that time when it was fresh in your mind?

A. Yes, sir.

Q. Where was your camera when this picture was taken?

A. I was standing about a hundred and fifty feet from signal post when train was passing, etc.

Q. Was not your camera on the Southern track?

A. Yes, sir.

Q. You were standing at quite an angle?

[fol. 19] A. Yes, sir.

Q. You were standing on the outbound Southern track?

A. Yes, sir.

Q. You took these measurements?

A. Yes, sir.

Q. From the base of the signal post to the outside rail was four feet ten inches?

A. Yes, sir.

Q. From the base of the signal post to the outside rail four feet ten inches?

A. Yes, sir.

Q. That is the nearest rail to the signal post?

A. Yes, sir, the nearest rail.

Q. What do you call the base of the signal post?

A. Right here.

Q. How far up does that base extend?

A. That is a good height there, I did not measure the height, I could not say positively.

Q. The lower part of that semaphore is that signal box, you don't call the whole of that box the base?

A. No, sir, I call this here the base.

Q. That is three feet two inches?

A. Yes, sir.

Q. Then at a height of four feet above the top would there have been a little greater space between the semaphore and the rail?

A. Yes, sir.

JOHN MCCRADY sworn.

Q. What is your occupation?

A. Civil engineer.

[fol. 20] Q. How long have you been a civil engineer?

A. I have been practicing on my own account about 18 years.

Q. Have you done much work for the Atlantic Coast Line R. R. Co.?

A. From time to time I do.

Q. At my request did you make certain measurements with regard to semaphore 3911?

A. Yes, sir.

Q. 3901, 3906 and 3916?

A. I did.

Q. Will you look at this and tell me what that is?

A. That is a sketch showing the distance from base of semaphore to nearest rail as measured on several semaphores on the Atlantic Coast Line R. R. Co. just north of Charleston.

Q. On what day was that survey made?

A. Monday, September the 23rd.

Q. Of this year?

A. Yes, sir.

Q. Looking at your plat there will you state what is the measurement from the base of semaphore 3911 to the outer edge of the western rail of the Atlantic Coast Line R. R. track?

A. I measured it to be four feet five and a quarter inches.

Q. What is the measurement of semaphore 3906?

Objected to, that is a different semaphore, it is not a question about that semaphore, it is a question about the semaphore where this man is alleged to have been killed.

Court: Go ahead.

Mr. Young: I object; the semaphore in question is 3911 and he is asking him about another one.

Court: The objection is overruled.

[fol. 21] Q. Now, 3906, is or not that the semaphore just by the viaduct?

A. Yes, sir; just south of it.

Q. North of 3911?

A. Yes, sir.

Q. What is the distance from the base of that semaphore to the west rail of the Coast Line track?

A. Five feet nine inches.

Q. The other is four feet five and a quarter inches?

A. Yes, sir, where the man was hurt.

Q. What about 3901?

A. That measured seven feet, six and a half inches. That is just north of the viaduct.

Q. The distance from the west bound rail of the Coast Line to the base of that semaphore is what?

A. Seven feet six and a half inches.

Q. Now 3916, is or not that just south of 3911?

A. Yes, sir.

Q. What is the distance from the center of the west track of the Coast Line to the base of the semaphore there?

A. Six feet seven and three quarter inches.

Q. Where he was killed is what?

A. Four feet, five and a quarter inches.

Q. From the outside of the west rail, your measurements are all made from the west rail to the semaphore?

A. Yes, sir, the base of the bottom of the semaphore.

Q. I want you to show the jury on that plat what you call the base of the semaphore, is that or not a sketch of a semaphore?

A. Yes, sir, with the exception of the cross arm, here is what I call the base, the base has a jog in it three feet one and a half inches.

Q. Assume that to be 3911 that is how far from the [fol. 22] west rail of the Coast Line track to the semaphore?

A. Four feet five and a quarter inches.

Q. Assume that to be 3906 how far is that from the rail?

A. Five feet, nine and a quarter inches.

Q. Assume that to be 3901, how far is that?

A. Seven feet six and a half inches.

Mr. Young: I renew my objection to the plat being offered in evidence.

Court: The objection is overruled.

Cross-examination:

Q. Where 3906 is, that is on a curve?

A. I think 3906 is just beyond the curve a few feet, probably 20 or 30 feet south of the viaduct, the railroad is on

a tangent under the viaduct, 3911 is on a straight piece of track and 3906 is on a curve, I believe, or just near the curve.

Q. How far from the curve?

A. I did not measure it.

Q. Was it on a straight piece of track?

A. I would not be sure about that.

Q. How about 3901?

A. That is on a straight track.

Q. 3916 is that just by the Five Mile?

A. Yes, sir.

Q. Is 3916 south or north of 3911?

A. It is south.

Q. By the Southern Connection tower?

A. Yes, sir.

Q. That one has no base, just a straight pole?

A. You are thinking about the home signal that has no base, I am talking about 3916, that is a regular sema-

[fol. 23] phore.

Q. You made these measurements just recently?

A. Yes, sir.

Q. You do not know whether these were the locations of the semaphores and tracks on the 6th of January, 1923, do you?

A. No, sir.

Q. How did you make the measurements, with a steel tape?

A. 3911 I measured with a six foot rule, the others being further apart I used a steel tape.

Q. You did not make any measurements four feet above the rail?

A. No, sir, they were measured directly from the base of the semaphore about the same height as the rail.

Q. That semaphore box is at the height of about three feet more or less?

A. There is an offset of three inches.

Q. That would make that four feet, seven and a half inches there?

A. Yes, sir.

Q. The distance would be greater as you went higher?

A. It would be the same up to about six feet four inches then there is around six inches difference.

Q. You travel on the Coast Line quite frequently?

A. Yes, sir.

Q. They have these semaphores up and down the road?
A. Yes, sir.
Q. You don't know the distances of any except these four you have testified to?
A. I can't say off hand but they range from eight to ten feet, I have measured a number of them.
Q. Have you measured any others?
A. Not at this particular time, I was asked to measure [fol. 24] these particular semaphores which I did.
Q. Do you know when these semaphores were put in?
A. No, sir.
Q. They are a safety device?
A. So I understand.

By the Plaintiff:

Q. They are a block system?
A. I think so.
Q. They may or may not be very dangerous to employees?
A. I don't know much about the system, I think it is for the operation of trains.

Court: I take it that the plat with the measurements being admitted in evidence that you will show that at the time of this action that the situation was the same as at the time these measurements were made.

Testimony of J. J. Mansfield taken at the former trial of this case read to the jury, the witness having since died.
During the reading of this testimony Mr. Young objected to the witness giving his opinion about a mark on the post.

J. J. Mansfield sworn.

Direct examination.

By Mr. Logan:

Q. Captain, you are Coroner of Charleston County?
A. Yes, sir.
[fol. 25] Q. You have held that position for a number of years?

A. Yes, sir, about 13.

Q. When an accident happens do you try to inform yourself of the circumstances under which it happens?

A. Yes, sir.

Q. As official Coroner of this County?

A. Yes, sir.

Q. Did you or not in the course of your duty have occasion to investigate the circumstances surrounding the death of George A. Marshall?

A. I did.

Q. Did you go to the scene of the accident?

A. I did.

Q. Did you or not examine the signal device where he was killed?

A. I did.

Q. Did you investigate to see if there was a mark where he was struck?

A. I did.

Q. Did you find a mark?

A. I did.

Mr. Figg: I object, he cannot give any opinion of the cause of it.

Court: I think he can describe the mark and give his judgment, the jury is not bound by his judgment.

Q. You did go up there and examine this pole?

A. Yes, sir.

Q. Will you state what you saw?

A. I would like to start from my telephone call.

Q. No, sir, tell what you saw.

A. After getting to the scene of the accident and finding Mr. Marshall dead between the tracks I went north about 25 feet and found on the east side of the pole about 4 or 5 inches from the ground the dew was brushed off about this [fol. 26] space 12 or 15 inches.

Q. On the side of that pole the dew was brushed off?

A. Yes, sir.

Q. You found Mr. Marshall a few feet south of that pole?

A. Between 20 and 25 feet.

Q. Were you there when the railroad made experiments to find out whether a man would strike that pole?

A. No, sir.

Q. You then subsequently held an inquest over this man's body?

A. Yes, sir.

Q. Did at that inquest Mr. Hartzog, the engineer of that train testify?

A. Yes, sir.

Cross-examination.

By Mr. Figg:

Q. Was it dark when you got there?

A. Yes, about three-thirty in the morning.

Q. Did you find anyone at the scene of the accident standing around?

A. I met the engineer and conductor.

Q. Were there a number of people standing around there, more than four or five?

A. I judge so.

Q. Were there more than ten?

A. I would not say so.

Q. I want you to indicate on this picture where that dew rubbing was found by you?

A. I judge around here on the east side of the pole.

Q. Will you mark with a pencil about where that mark was? I am asking you to tell where the dew was found rubbed off, you looked at it?

[fol. 27] A. Yes, sir.

Q. Just about where was it?

A. That is the base here, what is the height of the base?

Mr. Figg: I don't know.

Witness: The base may be two or three feet, I don't know.

Q. Was the mark on the base or the pole?

A. On the east side of the pole.

Q. Mark about that point?

A. Not until I get the information about the distance.

Q. Would you say it was on the round part of the pole?

A. I would say four or five feet from the ground.

Q. On this round part of the pole?

A. I would say on the signal light four or five feet from the ground.

Q. Did you make any investigation of the body of Mr. Marshall?

A. We brought him down about 8:20 and delivered him to Mr. Connelly.

Q. Did you examine his body to see what caused his death?

A. I did not.

Q. Did you look on his body for any marks to indicate if he struck anything?

A. No, sir.

Q. Did you make any measurements on the body?

A. No, sir, the undertaker does that.

C. A. Rice sworn.

Q. Where do you live?

A. Columbia, S. C.

[fol. 28] Q. How old are you?

A. 37.

Q. What is your occupation?

A. I work in the construction department of the State Highway Department.

Q. How long have you worked with them?

A. Seven years.

Q. Where did you work before that?

A. I was working at Hartsville building bridges for Tinderlake and Lewis.

Q. Where were you living in January, 1923?

A. At Mr. C. M. Tyner's residence at Hartsville, S. C.

Q. Was he the father of Mrs. Marshall?

A. Yes, sir.

Q. He has since died?

A. Yes, sir.

Q. Did you know George A. Marshall?

A. Yes, sir.

Q. Did you see Mr. George A. Marshall after his death when he was laid out?

A. Yes, sir.

Q. Where did you see his body?

A. In Mr. Tyner's home.

Q. That was the second of January, the day after he was killed?

A. Yes, sir.

Q. Was or not your attention called to the condition of Mr. Marshall's head?

A. Yes, sir.

Q. Did you look at his head?

A. I was shown his head; I did not touch the body.

Q. What did you see?

A. A plaster of some kind on the back of his head, his hair was long.

[fol. 29] Q. There was a plaster of some kind on the back of his head?

A. A cloth of some kind, I don't know what it was, I did not investigate it.

Cross-examination:

Q. You saw him in the coffin?

A. Yes, sir.

Q. On his back?

A. Yes, sir.

Q. You don't know what the extent of the injury was, you just saw a plaster on his head?

A. There was a cloth there of some kind, that is all I know.

Doctor J. L. Powe sworn.

Q. Doctor Powe, have you been appointed administrator of the estate of George A. Marshall?

A. Yes, sir.

Q. In the place of Mr. Tyner, who has since died?

A. Yes, sir.

(Letters of administration offered in evidence.)

Q. What is your profession?

A. Practicing physician.

Q. How long have you been practicing?

A. Since 1904.

Q. Where did you graduate?

A. At the Medical College at Charleston.

Q. Where do you practice now?

A. Hartsville, S. C.

[fol. 30] Q. How long have you been practicing there?

A. Since 1904.

Q. Doctor Powe, did you know George A. Marshall?

A. I did.

Q. At the request of his family did you have his body exhumed?

A. I did.

Q. Who was present at that time?

A. The undertaker, Mr. L. L. Brown of Hartsville, and C. M. Tyner, who has died since, and a negro man, Baby Ray, they call him, and two or three other parties, I don't remember who they were.

Q. Do you remember when that exhumation was made?

A. During February, 1929.

Q. Do you know whether or not Mr. Brown, the undertaker was the same gentleman who buried Mr. Marshall?

A. I do; he was.

Q. Did you make an examination of the head of Mr. Marshall?

A. Yes, sir the skull.

Q. Did you see the body before he was buried?

A. I did.

Q. Do you recollect any marks connected with his head?

A. I made no regular examination of his body, I made a casual examination and found some bandages on the back of his head.

Q. When the body was exhumed did you examine his skull?

A. I did.

Q. Have you that skull here?

A. I have.

Objected to as irrelevant.

Court: If he identifies it I think it would be relevant.

Q. Is that the skull of George A. Marshall?

[fol. 31] A. Yes, sir.

Q. What had happened to that skull?

A. It is rather hard to tell what had happened to it, I can tell you what the condition of the skull is, the posterior part of the skull was absolutely crushed in, that is the back of the head.

Q. The back of the head was crushed in?

A. Yes, sir, here are the bones here, all that was crushed in.

Q. Have you a normal skull here?

A. Yes, sir.

Q. I want you to show the jury from the normal skull what happened to this poor young man's head?

Mr. Young: I object to that. A lot of things might have happened since that time, it has been 6 years ago since the man was buried.

Court: He testified that he saw it put into the coffin, or before it was put in the coffin and if he can testify that when it was taken out of the ground it was in the same condition I think it would be all right.

Q. Were there any signs of disturbance of that body or the grave?

A. None whatever, it was in the public cemetery at Hartsville.

Q. You are sure that is George A. Marshall's skull?

A. I have no reason to believe otherwise.

Objected to, the witness does not know if that is the man's skull or not.

Court: I could not shut it out up to now.

Q. I want you to bring the normal skull and show the jury where this man was injured?

A. One way I identified the correct skull is that he had a bandage on the back of his head like he did when he was put away, you could tell there had been a bandage there [fol. 32] on account of the color of his head there, and there was no disturbance around the grave at all. Now here is where the man got the lick, all this was turned in, the posterior of the skull, the occipital bones and the bones on each side were crushed in the spine cord passing through here.

Q. What did that indicate?

A. That he had received a terrific blow in the back part of the head.

Q. So terrific that his skull was completely crushed?

A. Yes, sir.

Q. Was or not the neck broken?

A. Yes, sir.

Q. His spine was completely torn apart?

A. I would not say broken I would say disarticulated.

Q. Doctor, assume that a man's head came in contact with an iron semaphore with a train going 20 miles an hour could or not it have inflicted such an injury as you saw there?

A. Well I would judge so.

Q. Now, Doctor Powe, could a human skull deteriorate like that skull has in 6 years unless it was buried like that?

A. There is no deterioration in the skull; it is in perfect condition; here is a skull that is 27 years old.

Q. So that skull is just in the condition in which it was buried?

A. Yes, sir, there is no deterioration in it.

Q. What would be the effect of such a blow as would crush a man's skull as is shown in this case?

A. I would say he would be killed suddenly, he would die very quickly.

Q. That blow would cause sudden death?

A. Yes, sir.

[fol. 33] Q. Doctor Powe, with the condition of the skull of Mr. Marshall as you found it do you think that it is possible that that condition could have been produced from a man falling from a train on the ground?

A. I do not.

Q. You think that is impossible?

A. Yes, sir.

Q. Do you think that it would have been necessary to have a terrific blow to cause that injury?

A. He would have had to have a terrific blow in the back part of the skull.

Cross-examination:

Q. You were the family physician of Mr. Tyner at Hartsville?

A. Yes, sir.

Q. And have been for years?

A. Yes, sir.

Q. He lived there before his death?

A. Yes, sir.

Q. You saw the body of Mr. Marshall when it was brought there to be buried?

A. Yes, sir.

Q. You knew then that the back of the head was crushed in?

A. No, sir.

Q. You made an examination of him?

A. I made a casual examination, no autopsy?

Q. From that examination you knew the whole back of his head was crushed in?

A. No, sir; I did not know that.

Q. That was a very severe blow that killed him?

A. Yes, sir.

[fol. 34] Q. That blow would cause instant death?

A. Yes, sir, I would say so.

Q. You don't know, of course, what struck him, or what he struck?

A. I do not.

Q. His head coming in contact with any hard object at some speed would have caused that breaking of his skull?

A. I would say some speed, I would say considerable speed.

Q. The condition of that skull was caused by coming in contact with force with a hard object?

A. Yes, sir.

Q. But you don't know what force or what object?

A. No, sir.

Q. When did you exhume the body?

A. About the middle of February, 1929.

Q. At whose instructions did you do that?

A. Mr. Grace and Mr. Tyner.

Q. How did you locate the grave?

A. Mr. Brown, the undertaker, was the one who located the grave.

Q. You did not locate it?

A. I located it by the marks on the grave, it did not have any tombstone, an ordinary tin mark, that is all, I saw no tombstone.

Q. You could not say of your own knowledge that that was Mr. Marshall's grave?

A. I could beyond a doubt.

Q. I say of your own knowledge,—the undertaker told you that was his grave?

A. I don't know if I asked him that question.

Q. He took you to the grave?

A. I went there myself.

Q. How did you locate the grave?

[fol. 35] A. Because the undertaker was present at the grave.

Q. It was on his information that you located it?

A. I could have located that grave from the fact that he was buried there.

Q. You were not present at the funeral?

A. No, sir.

Q. You only know from what some one told you that that was his grave?

A. Yes, sir, I will have to say that.

Mr. Young: I move to strike out that testimony.

Mr. Logan: I will put up the undertaker.

Court: All right, I will let it stand until we hear from him.

Q. The skull was not exactly in that same condition when you took it out of the grave, did not you have to boil it two days?

A. Of course, there was a lot of skin on it, it was mumified, we had to clean it up, it was all crushed to pieces and I got the pieces.

Q. You had to cut the head off the body?

A. Just pulled it loose.

Q. The head was attached to the body?

A. Yes, sir.

By the Plaintiff:

Q. Doctor Powe, is there any doubt in your mind that this skull that you have produced here was in that condition when the man was buried?

A. Not a bit, no doubt whatever.

Q. Actually in the same condition, that it is in now?

A. Yes, sir.

Q. You also saw the man laid out?

A. I saw him in the soffin.

[fol. 36] Q. And you saw certain bandages on his head?

A. Yes, sir, on the back of his head.

Q. And when the body was exhumed the bandage was on the back of his head?

A. Yes, sir.

Q. Is there any doubt that that is the body of George A. Marshall?

A. Not any more than that is your body.

Q. Now you have been asked about death being instantaneous, assume a man riding on the side of a train and

striking an object——

Mr. Young: I object to that.

Court: Go ahead.

Mr. Young: There are no facts in evidence to assume that from.

Q. Assume that he came in contact with a semaphore would he fall right off of the train?

Mr. Young: I object to that as leading and assuming facts not proved, before you can put a hypothetical question you have to prove some facts on which to assume the question.

Court: Go ahead, the objection is overruled.

Q. Would the man have fallen instantly or would he have been carried some distance from the momentum of the train?

Mr. Young: I object to that and move to strike it out; that is not a question of medical testimony as to the speed of the train, the doctor said the man was killed instantaneously, I don't think he is an expert on what the train would do.

Court: I will let it stand, the objection is overruled.

Q. In your opinion would you say he was rendered instantly unconscious and killed instantly by the blow?

A. I would say so.

[fol. 37] Q. He would immediately relax?

A. I don't know so much about that, he might have a grip that might not relax suddenly but by degrees, I have had things like that to happen.

Q. If he relaxed slowly and the train was going at a speed and he was carried past the object that hit him, there is no doubt he had a violent blow and if he relaxed gradually when he hit the ground he was unconscious?

A. Oh yes, he was knocked entirely unconscious when this thing struck him.

Q. If the train was going at a speed the force would throw him in the direction that the momentum carried him?

A. It was in the back of the head, it might have knocked his head around, not necessarily thrown him anywhere.

Q. The testimony of the Coroner is that he was found some feet from the semaphore? If he had fallen from a

train moving at a considerable speed he would have naturally made some marks on the ground?

A. He might have rolled over after he struck the ground but I understand he was not dragged but I don't know anything about that.

L. L. Brown sworn.

Q. Mr. Brown, where do you live?

A. Hartsville, S. C.

Q. How long have you lived there?

A. All my life.

Q. You are how old?

A. 29.

[fol. 38] Q. What is your occupation?

A. Undertaker.

Q. Mr. Brown, did you know George A. Marshall?

A. I did.

Q. Do you remember his body being exhumed?

A. Yes, sir, I do.

Q. Was or not Doctor Powe present when it was exhumed?

A. He was.

Q. Did you know where the grave was where you buried that man?

A. Yes, sir, I had it marked.

Q. When you saw the remains was there any doubt in your mind whatever that that was George A. Marshall?

A. None at all.

Q. And Doctor Powe was present when the body was taken out of the coffin?

A. Yes, sir.

(Skull offered in evidence.)

J. A. Manning sworn.

Q. What is your name?

A. J. A. Manning.

Q. Mr. Manning, where do you live?

A. On Brigade street.

Q. Were you or not formerly in the employ of the Atlantic Coast Line Railroad Company?

A. Yes, sir.

Q. Up until when?

A. March 2nd, 1929.

Q. What was your position at that time?

[fol. 39] A. Yard foreman.

Q. How long have you been a railroad man?

A. Well, I have been in actual train service about 11 years.

Q. Are you or not familiar with the work of switchmen, and brakemen and yard conductors on railroad trains?

A. Yes, sir.

Q. Are you familiar with semaphore 3911?

A. Yes, sir.

Q. Are you or not familiar with the location of semaphore 3906?

A. Yes, sir.

Q. Is or not 3906 just south of the viaduct?

A. Yes, sir, a few feet south of it.

Q. Are you familiar with the location of semaphore 3901?

A. Yes, sir.

Q. Where is that?

A. Just north of the viaduct on the main line.

Q. How about 3916?

A. Yes, sir.

Q. Where is that?

A. On the east side, north bound main line just south of 3911.

Q. Were you familiar with those semaphores in January, 1923?

A. Yes, sir.

Q. Have or not the location of those semaphores been changed in that period of time?

A. No, sir.

Q. They are just like they were before.

A. Yes, sir.

Q. Knowing the location of semaphore 3911 and assum-

[fol. 40] ing a body found 29 to 25 feet south of that how fast would you say a train was going——

Objected to. I don't think he is an expert.

Court: Let him answer the question first.

Q. I understood you to say you had been in the railroad business 11 years.

A. Yes, sir.

Q. What did your duties consist of, did they or not consist of riding on trains and box cars.

A. Yes, sir.

Q. Could you possibly tell or not how many times you have ridden on the tops or sides of cars.

A. No, sir, that is impossible.

Q. Have or not 11 years of your life been devoted to the business?

A. Yes, sir.

Q. Are you or not acquainted with the speed of trains?

A. I should say fairly good.

Q. Now, Mr. Manning, having seen semaphore 3911, the Coroner said he found the body 20 or 25 feet south of that what would you say was the speed of the train that threw him there?

Objected to. He has not qualified as an expert on moving bodies there is not any proof yet that any train went by the semaphore.

Q. Have you or not ever seen packages or sacks thrown from moving trains?

A. Yes, sir.

Q. Have you or not seen mail sacks thrown from moving trains?

A. Yes, sir.

Q. And packages and objects and bags of various kinds from time to time at railroad depots?

[fol. 41] A. Yes, sir.

Q. Do you mean moving trains or standing trains?

A. Moving trains.

Objected to. That is purely opinion testimony, every day knowledge and I submit the question is not proper.

Court: I will let him give his testimony, his opinion about it and the jury can attach whatever importance they wish to it.

Q. What would you say the speed of that train was?

A. I should say between 25 and 30 miles an hour.

Q. Now, Mr. Manning, having, as you say, ridden on trains so many times that you cannot tell the number is there or not a certain sway to moving box cars?

A. Yes, sir.

Q. Assume a train moving at a speed of 20 or 30 miles an hour what would be the sway of a box car?

A. I would say 10, 14 to 16 inches.

Q. That would be the sway of the box car from side to side?

A. Yes, sir.

Q. Now, are you familiar with the duties of a switchman?

A. Yes, sir.

Q. Is there or not any particular place that a switchman has to ride on the car?

A. No, sir, not any particular place.

Q. Does that not depend on the duties he is performing at that particular time?

A. Yes, sir.

Q. That would depend entirely on the duties he was performing at the time?

A. Yes, sir.

Q. Is not it a part of the switchmen's duties to pro-
[fol. 42] tect the railroad's rolling stock?

A. Yes, sir.

Q. Is or not it a part of his duties to watch the brakes or anything that might get out of order about the cars?

A. Yes, sir.

Q. Assuming that something did get out of order would it or not be a part of his duty to find out what was out of order?

A. Yes, sir.

Q. In order to find that out would he or not have to ride whereaver his duties at that particular moment called him?

A. Yes, sir.

Q. Are or not box cars equipped with ladders?

A. Yes, sir.

Q. Do those ladders extend from the side of the cars?

A. From the side and also the end.

Q. What are those ladders put there for?

A. For the employees to use, go up and down.

Cross-examination:

Q. Did Mr. Marshall work with you at all?

A. Yes, sir, a few times.

Q. Whereabouts did you work with him?

A. In the Coast Line yard.

Q. Out in the freight yard at Columbus Street and Bennett's Yard?

A. I don't remember him ever going out there with me.

Q. All of you go out to Bennett's Yard, that is where they make up trains as well as here?

A. Yes, sir.

[fol. 43] Q. And he must necessarily have gone out there?

A. Yes, sir.

Q. You don't know anything about the sway of any particular box bar you know all of them sway?

A. It is according to the bearings; some sway more than others.

Q. All sway, and all railroad men know that?

A. Yes, sir.

Q. Any man working as a switchman knows that they sway?

A. Yes, sir.

Q. When you say they sway, you mean the top sways?

A. All of it sways down to the truck.

Q. The whole car moves?

A. Yes, sir, except the truck.

Q. It moves more at the top than the bottom?

A. Yes, sir, the car is fastened to a plate, there is a plate that holds it and a pin and a center plate, a heavy piece of metal.

Q. That would let the top sway but not the whole bottom?

A. The whole box car would have some sway.

Q. It is fastened to the trucks?

A. Yes, sir with a pin.

Q. And the center plate?

A. The center plate is like that.

Q. With a pin in the center?

A. Yes, sir.

Q. The trucks are the part that contain the wheels?

A. Yes, sir.

Q. The wheels have a flange that holds them on the track?

A. Yes, sir.

Q. The guage of the track if four feet seven and a half [fol. 44] inches?

A. I am not sure of that, four feet and something.

Q. The flange of the wheel does not fit exactly like a machine bearing there is a little play in there?

A. Yes, sir.

Q. Very little or the cars would be derailed all the time?

A. Yes, sir.

Q. The center bearing or the side bearing, there is a piece across the truck?

A. Yes, sir, the bolster.

Q. Then there is a bearing on either side of that outside of the center plate, a plate attached to the car and bolted and when they come together that is as far as the car can sway?

A. Yes, sir.

Q. What is the clearance on that?

A. Some are more than others.

Q. All railroad men know that the cars sway?

A. Yes, sir.

Q. You say you were familiar with semaphore 3911?

A. Yes, sir.

Q. Marshall had passed there many times?

A. Not so many times, he had not been in this yard as long as I had.

Q. He had been here about three months in 1922, that is the time you worked with him?

A. Yes, sir.

Q. Then he came back in December 1922 and worked until the time of his death?

A. Yes, sir.

Q. His work during that time took him constantly up and down the road?

A. Yes, sir.

[fol. 45] Q. The movement between the Charleston and Bennett Yard is known as a main line movement?

A. The engineers call it a main line movement.

Q. The through trains run over that piece of track?

A. Yes, sir.

Q. It is not yard track?

A. No, sir.

Q. The semaphores were put up about 1916?

A. I don't know, I was not here then.

Q. They were there some time before you were here?

A. Yes, sir.

Q. You came here in 1918?
A. I was ten years on the Coast Line.
Q. How long did you work here?
A. Ten years, since 1919.
Q. The semaphores were in the same condition when you came here?
A. Yes, sir.

A. C. KLECKLEY sworn.

Q. Where do you live?
A. On Spring street.
Q. 200 Spring Street?
A. Yes, sir.
Q. What is your occupation?
A. Railroad employee.
Q. Who are you employed by?
A. The Southern Railway.
Q. How long have you been in the railroad business?
A. Thirty odd years.
Q. Are you familiar or not with the movement of rail-
[fol. 46] road cars?
A. Yes, sir.
Q. Do you know whether or not in the movement of these cars they sway?
A. Yes, sir.
Q. About what would you say is the swaying movement of a car—assume a speed of 20 miles an hour?
A. Between ten and twenty inches.
Q. Have you or not seen that semaphore 3911?
A. I could not tell by the number.
Q. Is that a pretty fair picture of that?
A. Yes, sir, I have seen that near five mile.

Cross-examination:

Q. What is your occupation?
A. I work for the Southern Railroad.
Q. What are your duties?
A. I am in the oil house at the present time.
Q. How long since you have run on the road?
A. 1925.
Q. What were you doing in 1920?

A. Conductor in passenger service.

Q. How long since you have run on freight trains?

A. Since 1910.

Q. You did not know much about the sway of box cars in 1923?

A. I don't know, I could not say, but the sway is there.

Q. You did not know anything about it in 1923 that was 13 years after you stopped running on freight trains?

A. Yes, sir.

Q. Is not that a fact?

A. Yes, sir.

Q. You just know that box cars sway because all rail-
[fol. 47] road men know that?

A. Yes, sir.

Q. All of them know that?

A. Yes, sir.

Q. 20 or 25 miles an hour is not fast for a train to run these days?

A. No, sir.

Q. If a box car sways 20 inches at 25 miles an hour how much would it sway at 50 miles an hour?

A. They don't run that fast. The maximum speed of freight trains now is 30 miles an hour.

Q. You are in the oil house now?

A. Yes, sir, but I know from what they used to do.

Q. How do you know that?

A. Because they are scheduled.

Q. You study the schedules?

A. Yes, sir.

Q. How long ago did you study them?

A. I could not tell you what date.

Q. How often have you studied them?

A. Once in a while I get hold of one and overlook it.

Q. What schedules have you studied?

A. I could not tell you now; most of them.

Q. What is the running time on a through freight train on the Coast Line from here to Florence?

A. I could not tell you.

Q. You have not studied that?

A. I never have run a train on the Coast Line.

Q. You don't know the speed of Coast Line trains?

A. I could not say that I do, but the maximum speed of a freight train is 30 miles an hour.

Q. On the Southern Railway?
A. No, on most any railroad.
Q. But you don't know the speed on the Coast Line?
[fol. 48] A. No, sir.
Q. Mr. Kleckley, another thing, the sway of the box car that is on the top?
A. All over the car.
Q. You men all know cars move that way?
A. Yes, sir.
A. Yes, sir, up and down and sideways.
Q. You don't mean the top only, the whole car?
A. Yes, sir, the whole car.
Q. The bottom as well as the top?
A. Yes, sir.
Q. How is the bottom fastened to the trucks?
A. The body is placed on the trucks?
Q. How is it fastened?
A. It is fit with a center plate and center pin.
Q. That is a heavy piece of steel?
A. I suppose so.
Q. That is attached to the bolster?
A. Yes, sir.
Q. That is a very heavy beam going across the truck?
A. Yes, sir.
Q. The center plate is like a cup and saucer they fit in like two pieces and the center pin is through the center of that, is not that correct?
A. Yes, sir.
Q. When you say the box car sways ten to twenty inches you mean it sways ten inches and twenty on the other?
A. Yes, sir, back and forward.
Q. Ten to twenty inches out of plumb on that side and then on the other side?
A. Yes, sir,
Q. I am not a railroad man and I want to understand it. It goes ten to twenty inches over this side and sways and [fol. 49] goes ten to twenty inches on this side?
A. Yes, sir.
Q. That is known to all railroad men?
A. Pretty well any man working for a railroad company.
Q. Any man working as a switchman on a train is bound to know that?
A. Yes, sir.

C. C. Tyner sworn.

Q. Where do you live?
A. Florence, S. C.
Q. Did you know Mr. George A. Marshall?
A. Yes, sir.
Q. What relation was he to you?
A. A brother-in-law of mine.
Q. Did you testify at the last trial of this case?
A. No, sir.
Q. Why not?
A. I was appointed administrator of the estate of Mr. Marshall and I tried to make a satisfactory settlement with the company.
Q. You did not testify?
A. No, sir, I asked you not to use me as a witness because I was connected with the Atlantic Coast Line Railroad Company.

Mr. Young: I object to his reason for not testifying. That is no part of this case.

Q. Were you or not subpœnaed to appear in this trial?
A. Yes, sir.
Q. What is your present occupation?
[fol. 50] A. Yard foreman for the Atlantic Coast Line Railroad Company in the Florence yard.
Q. Did you know Mr. Crawford, who was the conductor of the train at the time Mr. Marshall was killed?
A. Yes, sir.
Q. How does your present position compare with the work he was doing at that time?
A. I hold the same position that Crawford held at that time.
Q. Now, Mr. Tyner are you familiar with the location of semaphore 3911?
A. Yes, sir.
Q. Where is that semaphore?
A. Just north of Stoney curve?
Q. Do you know where 3906 is?
A. Yes, sir; that is north of 3911.
Q. Do you know where 3901 is?
A. Yes, sir, that is north of 3906, just beyond the bridge.
Q. Do you know where 3916 is?
A. Yes, sir, that is south of 3911.

Q. Were you or not familiar with the location of those semaphores in 1923 when Mr. Marshall was killed?

A. Yes, sir.

Q. Do you know whether or not they are in the same position now as they were at that time?

A. I think they are in the same position now that they were in 1923.

Q. Now, Mr. Tyner, were you in Charleston the day that your brother-in-law, Mr. Marshall, was killed?

A. Yes, sir, my sister wired me and I came down on 83 on the morning of the 6th.

Q. Did you see Mr. Crawford that day?

A. Yes, sir, I saw him that day.

[fol. 51] Q. Did you or not go to semaphore 3911?

A. Yes, sir, I went to semaphore 3911.

Q. Did you make any investigations as to the conditions around there?

A. Yes, sir, I examined the semaphore casing and surrounding conditions.

Q. What did you find?

A. I found about four feet from the base of the semaphore apparently something had wiped the smoke and soot off the semaphore and about six or seven inches further apparently blood stains on the north side of the semaphore casing.

Q. Now, Mr. Tyner did you see your brother-in-law after he was laid out after his death?

A. Yes, sir.

Q. Where was that?

A. At my father's home at Hartsville.

Q. Who was there at that time?

A. Mr. C. A. Rice.

Q. Was Mr. C. A. Rice the gentleman who testified here?

A. Yes, sir.

Q. Did or not anything attract you about the appearance of Mr. Marshall's head, or anything?

A. There was a blood clot on each side of the neck and I raised his head out of the coffin and examined his head and found a pad on the back of his head put there I imagine to absorb the blood, and I felt back there and the back of his head was all crushed in, was all soft and I called Mr. Rice's attention to the fact.

Q. Now, Mr. Tyner, how long have you been employed by the Coast Line?

A. I have been employed by the Coast Line since April 9th, 1918.

[fol. 52] Q. In what position did you first work when you went with the Coast Line?

A. I hired as a flagman on the Charleston district under Bo Bennett between Charleston and Savannah.

Q. Were you in yard service?

A. No, sir, I was in main line service, but I ran in and out the yard, I was familiar with the location of the yard.

Q. Are you or not obliged to be familiar with the place where brakemen or switchmen must ride on the train?

A. Yes, sir.

Q. Is that part of your duty?

A. Yes, sir.

Q. Is there or not any particular place on which a man must ride on a box car while it is moving or does he have to ride where his duties call him at the time?

A. He has to ride where his duties call him at the time.

Q. Where do brakemen or switchmen ride?

A. They are supposed to ride wherever their duties call them. If it calls them on the south end or north end or top, and if his duties call him to remain on the side it is his duty to remain there to protect the property and rolling stock of the Coast Line.

Q. Now, Mr. Tyner, as a railroad man are you or not familiar with the sway of railroad cars in motion?

A. Yes, sir.

Q. Now, assume a car moving at the rate of 20 or 25 miles an hour, what would you say the sway would be?

A. From ten to twenty inches the sway beginning about a little mid way the car.

Cross-examination:

Q. Where did you get word of Mr. Marshall's death?

A. From my sister over long distance over 362, I got a [fol. 53] phone call from my house.

Q. What time of day was that?

A. About 3.15 a. m. I had about 40 minutes to catch 85 and could not and came on 83.

Q. What time does 83 get in?

A. At that time I think around 12.25 in the daytime.

Q. Then you had to go out to the scene of th accident?

A. Yes, sir.

Q. How did you get out there?

A. I went out there with Mr. J. H. Lee.

Q. You went out there with Mr. Lee?

A. Yes, sir.

Q. Who else was out there?

A. There was no one but me and Mr. Lee.

Q. These semaphore boxes are made out of sheet iron?

A. Yes, sir, I think so.

Q. A great many of them have dents in them?

A. I guess so, I don't think they are dressed iron, I think they are regular rough castings, I don't think they have been run through a lathe. I guess they have dents in them.

Q. You got in here about 12.30, was the train on time?

A. Yes, sir.

Q. That was on the 6th of January.

A. Yes, sir.

Q. What time did you get out to the semaphore?

A. I guess about 1.30.

Q. Mr. Marshall's body had been removed before you got there?

A. Yes, sir.

Q. Mr. Lee had not been out there before?

A. I don't think he had, no.

Q. You and he were the only two who went out?

A. Yes, sir.

[fol. 54] Q. You say these box cars sway as they run?

A. Yes, sir.

Q. How much do they sway?

A. From ten to twenty inches. They have a greater sway at the top than the bottom.

Q. Mr. Kleckley is all wrong in his testimony?

Mr. Logan: I think the Supreme Court has held that you cannot ask one witness if another witness's testimony is incorrect.

Court: I will have to sustain the objection.

Q. The bottom does not move ten to twenty inches from side to side?

A. No, sir, those trucks are built on a bolster the shape of a chair rocker and they fit into a groove and a pin goes through and they rock like that, sway.

Q. There is a center plate on the bolster?

A. Yes, sir.

Q. And on the car that fits into?

A. Yes, sir.

Q. Made out of heavy metal?

A. Yes, sir.

A. They call them male and female parts?

A. Yes, sir.

Q. And in addition to that they have a side bearing?

A. Yes, sir.

Q. What is the clearance in those side bearings?

A. I would say two to three inches; they might be greater, I have never measured the distance.

Q. You work down here at the Charleston yard?

A. I run out of the Charleston yard, brakeing and flagging to Savannah.

Q. You pass over this pieec of track?

A. Yes, sir, I flagged from April the 9th to October the 10th then I was transferred.

[fol. 55] Q. What year was that you were doing that?

A. 1918.

Q. Those semaphores were located at that time just as they are now?

A. Yes, sir.

Q. In 1922 or 1923 they were there?

A. Yes, sir.

Q. All you railroad men are familiar with that sway of the box cars?

A. Yes, sir.

Q. Mr. Marshall, your brother in law, worked two years for the Coast Line at Florence before he come here?

A. I don't know how long he worked there I was on the main line, then, he worked some time, I don't know how long.

Q. He worked down here some time?

A. He worked here a while and was cut off and was called back.

Q. He worked also at Bennett Yard?

A. I don't know whether that was his regular job. He was an extra man; he was not a regular assigned man.

Q. All you railroad men know about the semaphores alongside of the track?

A. Yes, sir.

Q. You are familiar with the rules of the company?

A. Pretty well sir.

Q. You were familiar with them in 1923?

A. I guess I was.

Q. Was rule 706 in effect then: "Employees are required to inform themselves respecting the location of all structures or obstructions along the line which will not clear them when on the top or sides of cars."

A. Yes, sir.

Q. That was the rule of the Atlantic Coast Line R. R. [fol. 56] Co., the company for which you worked?

A. Yes, sir.

OFFERS IN EVIDENCE

Mr. Logan: I offer in evidence the mortuary tables which show that Mr. Marshall had an expectancy of 37.43 years.

I also offer in evidence the seventh paragraph of the defendant's answer, which reads as follows:

"Seventh. Further answering said complaint, and for a further defense to said action, this defendant alleges that the injuries and death of the deceased were due to and caused by the negligence of the said deceased contributing to and combining and concurring with the alleged negligence of the defendant and constituting a proximate cause thereof, without which the same would not have happened, in the following particulars, to wit:

"(a) In not going directly to the roof of the freight car on which he was riding as instructed by the conductor of said train, but in remaining on the side of the car, contrary to said orders and instructions.

"(b) In not keeping a proper lookout for the signal devices and other obstructions which are ordinarily erected on the side of tracks of the defendant, near said tracks.

"(c) In failing and omitting to keep a proper lookout for the semaphore mentioned in the complaint herein, whose presence and location were well known to the deceased.

"(d) In leaning outward from the ladder of said freight car so far as to bring his body in contact with the said semaphore erected at a greater distance from the track than is required by the regulations of the South Carolina Railroad Commission, hereinbefore set forth."

Mr. Young: I object to that being offered in evidence. You can offer many defenses as you wish to and that is [fol. 57] a part of the defense of contributory negligence.

Court: I will let it go in evidence but I don't think it is really necessary.

The Plaintiff rests.

Mr. Young: If your honor please, I offer in evidence certified copies to two circulars of the South Carolina Railroad Commission:

"Circular No. 211, Amending Circular 209

Clearances

"Columbia, S. C., May 24th, 1916.

To all railroads operating in South Carolina:

"The Railroad Commission of South Carolina unanimously adopted the following resolution:

"Taking into consideration not only the safety of the general public and employees of the railroad, but for the further consideration that it is absolutely necessary for all railroad employees to give and receive signals.

"Be it resolved that no building, or platform, or other obstruction be allowed erected or maintained nearer than four feet of the outer edge of the nearest rail of the main or side track of any railroad in the State of South Carolina.

"This limit of clearance shall not apply to bridges already constructed, or to passenger landings.

"Please be governed accordingly."

"Circular No. 216, Amending Circular No. 211

Clearances

"Columbia, S. C., October 11th, 1916.

To all railroads operating in South Carolina:

[fol. 58] "The Railroad Commission of South Carolina unanimously adopted the following resolution:

"Taking into consideration not only the safety of the general public and employees of the railroad, but for the further consideration that it is absolutely necessary for all railroad employees to give and receive signals:

"Be it therefore resolved that no building, or platform, or other structure about station grounds be allowed erected or maintained nearer than four feet from the outside edge of the main or side track rail of any railroad in the state of South Carolina, measurements being made at rail top level; and furthermore, that no obstruction be allowed erected or maintained at any point other than station grounds nearer than four feet from the outer edge of the main or side track rail of any railroad in the State of South Carolina, measurement being made four feet above the top of rail.

"This limit of clearance shall not apply to bridges already constructed, or to passenger station landings.

"Please be governed accordingly."

In Court of Common Pleas of Charleston County

Motion for Directed Verdict

Mr. Young: I now ask your honor to direct a verdict for the defendant on the ground that the plaintiff has failed to prove any actionable negligence on the part of the defendant in this case.

Second. That if your honor should hold that they have proved any negligence, then the deceased came to his death as a result of one of the risks assumed in his employment, to wit: the risk of striking the semaphore described in the testimony whose presence and location was well known to

the deceased and the alleged danger and risk of which he [fol. 59] saw or by the exercise of ordinary care could have seen and appreciated at the time of the accident, and,

Third. There is no evidence in this case at all as to how the deceased came to his death or as to the proximate cause thereof.

Court: I will have to submit it to the jury, Mr. Young. I have some doubt about it in my mind, the evidence in this case is not exactly like it was in the last case.

In Court of Common Pleas of Charleston County

Charge to Jury

Now, gentlemen of the jury, I will try to submit this case to you under the law as I think it is, and, of course, the jury will take the law as I give it to them and if I make any mistake in stating the issues I wish counsel would correct me. Now, gentlemen of the jury, the plaintiff in this case who is the administrator of the estate of George A. Marshall, brings this suit against the Atlantic Coast Line Railroad Company and he alleges that George A. Marshall died on the 6th day of January, 1923 and left no will and at the time he was married and at the time of his death he was married and left surviving him his heirs and distributees Sallie Marshall and three children, whose names are set forth in the complaint. That on the day he was killed, the 6th day of January, 1923, and for some time before this he was employed by the defendant railroad company in the capacity of switchman and that while in the employment of the defendant railroad company and engaged in the duties incident to and growing out of the employment in running [fol. 60] and operating one of the defendant's trains engaged in interstate commerce he met with an accident and was so badly injured that he died on that day and this action is brought under the provisions of the Federal Employers' Liability Act. They state further that he was engaged in his duties as switchman on an engine and train of cars of the defendant R. R. Company moving over the defendant's main line at or near the city of Charleston in

the direction of this city; that it was dark and foggy and about three o'clock in the morning; that while proceeding as aforesaid at or about Five Mile crossing, near said city the engine and train of cars were caused to be stopped by reason of trouble with the brakes of some of said cars or other cause, and that the said George A. Marshall in the course of his duty and employment got down on the ground to examine into and correct said trouble; that at or near the point where said engine and train of cars had stopped as aforesaid, defendant herein, Atlantic Coast Line Railroad Company, its agents and servants, in violation of its duty to furnish for the use of the said George A. Marshall a reasonably safe roadbed and track free from obstructions which might be placed on the side of the track, and to place and maintain signal devices at a reasonably safe distance from the track so as not to extend over towards the track in such close proximity as to endanger the lives of its employees who might be running or operating its trains by said signal devices, had placed and maintained a signal device or obstruction too close to the track, and in such close proximity to the track as to leave an insufficient space intervening between it and the side of the train, and so close as to interfere with the proper operation of defendant's trains and the proper performance of their duties by its employees thereabout, so that upon said train proceeding forward, and [fol. 61] while the said George A. Marshall was mounting the ladder of one of the cars attached or while he was examining the defective car as aforesaid, the defects in which were due to the negligence of the defendant herein, thereby necessitating that said decedent examine the same, and that while thus engaged in the duties incident to his employment, he was struck by said signal device or obstruction and thrown from his train and so badly injured as to cause his death thereafter.

So boiled down and put in a few words that means that while Marshall was performing his duties as switchman and was up on the side of one of these cars they passed along by this semaphore, or signal device and he was struck in the head and killed, and the plaintiff claims that the defendant was negligent in placing the semaphore or signal device too close to the track. Now they set out and specify the particular negligence upon which they rely in this case

in several specifications which I will read to you and I want you to listen to them very closely because the burden is on the plaintiff to make out his case by the greater weight of the evidence and if he does not your verdict must be for the defendant, and if he recovers at all he has got to recover on one or more of these specifications of negligence and no other, because upon these specifications of negligence he bases his case and if he does not make out one or more then he has made out no case. He must make out not only that the defendant was negligent in the particulars complained of but that such negligence was the proximate cause of the death of this man. Now what are those specifications of negligence and in what particulars is the plaintiff charging the defendant here with negligence.

(a) In failing and omitting to furnish the said decedent [fol. 62] a reasonably safe place to work.

(b) In failing and omitting to furnish a reasonably safe readbed and track free from obstructions.

(c) In failing and omitting to place and maintain said signal device at a reasonably safe distance from the track.

(d) In causing and allowing said signal device or obstructions to be placed and maintained too close to the track.

(e) In causing and allowing said signal device or obstruction to be placed and maintained in such close proximity to the track as to leave insufficient space between it and the side of a train within which employees might safely perform the duties incident to their employment and the proper operating of defendant's trains.

(f) In causing and allowing said signal device or obstructions to be at the point, place and position the same was maintained.

(g) In failing and omitting to notify or warn said decedent of the close proximity of said signal device or obstructions to the side of the train.

(h) In causing and allowing a defective and bad order box car to be attached to and form a part of the train and to be transported by the engine to which decedent was attached.

Court: There is no evidence as to specification (h) and that goes out of the case.

(i) In causing and allowing said engine and train of cars to be run at a high and dangerous and excessive rate of speed within the yard limits and block system of de- [fol. 63] fendant and in violation of its rules and regulations governing the same. Now those are the specifications of negligence and remember that so far as the specification of negligence as to the bad order or defective box car is concerned it is admitted that there is no evidence about that and that goes out.

Now they allege that at the time of the death of George A. Marshall he was a married man and left surviving him his widow Sally T. Marshall and the three minor children named, all of whom were dependent upon said decedent for their support and maintenance; that decedent at the time of the happening of said accident was earning one hundred and eighty dollars per month, was a young man of 25 years, strong healthy and able-bodied, was kind and affectionate to his wife and children, and by reason of the negligent killing of said decedent his wife and children have been injured in the sum of fifty thousand dollars and they ask a verdict at your hands for fifty thousand dollars damages.

Now, the defendant comes into court and answers that and admits the allegations of the first, third and fourth paragraphs of the complaints, that is that Marshall died on the date they allege and that he left his wife and children and the third is that the railroad company was a railroad organization under the laws of the State of Virginia doing business in the County of Charleston and was engaged in interstate commerce, and that Marshall while in the employment of the corporation and engaged in his duties as switchman met with an accident and was killed. Now, those paragraphs of the complaint are admitted and it is also admitted that this action is brought under and in pursuance of the Federal Employers Liability Act, and going further in their second defense they deny each and [fol. 64] every other allegation of the complaint not specifically admitted or denied and go further with specific reference to subdivisions A, B, C and D in paragraph six of the complaint which are the specifications of negligence

and the other allegations in the complaint referring to the semaphore they say that on or about the 14th day of Ma[illegible] 1916 the Railroad Commission of South Carolina issued a circular covering this question of the distance they were to place semaphores from the railroad track, circular 211 amending circular 208. (Reads same). Then the Railroad Commission of South Carolina issued circular 216 with regard to clearance, (reads same), and a copy of this was served on the defendant, and they say they complied with that. In other words they allege in the fourth paragraph of the answer that they put the semaphore even further than was required by the railroad commission under these circulars which I have read to you, and the defendant claims and sets up that the death of Marshall was due to and caused by one of the risks of his employment assumed in working for the defendant, that is to say, now there is interlined here "on information and belief", they say the risk of riding on a freight car and passing various obstructions such as signal devices, semaphores and the like whose presence they allege were known to him and the danger of which were obvious and so assumed by him, and in the 6th paragraph on information and belief they allege that the death of Marshall was due to and caused by one of the risks of the employment assumed in working for the defendant, that is to say, the risk of the work of a switchman working about cars, with defects arising in the ordinary operation of the cars the occurring of such defects in such operation being reasonably in the contemplation of the parties when the deceased undertook to work for the de-
[fol. 65] fendant, and said defects in this case being obvious and actually known to the deceased and ordinarily incident to his employment. Now the seventh paragraph of the answer which sets up contributory negligence goes out as there is no evidence on that.

Now, Mr. foreman, and gentlemen of the jury, I will give you the law as best I can, some times I make mistakes and if I do the case is sent back as in the Youngblood case where Judge Cothran said it was like rolling an empty barrel, but I shall give you the law as best I can and when I have done that I have done all that I can do and my conscience is clear. Now this is a action based on negligence and I want to say to you gentlemen (addressing

counsel in the case) that there are allegations of wilfulness and wantonness in here and in the State Court a man damaged by wilfulness and wantonness can recover the same as if he was damaged by negligence, of course there is no such thing as punitive damages in this case. Now, Mr. Logan, do you want me to submit to this jury the question of wilfulness and wantonness?

Mr. Logan: I don't think you can recover under the Employers Liability Act for wilfulness and wantonness. I don't think you can recover any damages for that. I think the damages are limited to the pecuniary loss suffered by the widow and children.

Court: In the state court you can recover actual and punitive damages but under the Employers Liability Act you cannot recover any punitive damages but in the state court you can recover actual damages which may happen from wilfulness or wantonness or from negligence. Now how is it under the Employers Liability Act?

Mr. Logan: I think you could recover actual damages for [fol. 66] any act of the defendant whether they be negligent or wanton or wilful, and if there is any testimony of wilfulness or wantonness the damages could not be increased over the pecuniary loss. I think as to increasing the damages that would have to be withdrawn. What they have to pass on is what your honor will charge them on the measure of damages under the Federal law. I would prefer that your honor charge them only on negligence and not wilfulness and wantonness.

Mr. Young: As I understand the rule under the Federal Employers Liability Act they can only recover for pecuniary loss, not for sorrow and grief, just the cold, hard money they lost.

Court: There is no doubt about that. So, Mr. foreman and gentlemen of the jury, the question of wilfulness and wantonness alleged in the complaint goes out and you will now try this case on the allegations of negligence in the complaint, and right at the beginning I want to say to you that what was done in the other case has nothing to do with this case. You and I are trying this case just as if it was coming into court for the first time and we must do it that way. What is the case that has been made before us as presented by the plaintiff? That is what we

must act on and nothing else? What is meant by negligence? Ordinarly we would say it is carelessness, but there are legal definitions of it. One is that it is the want of ordinary care. It is the doing of something that a man of ordinary caution and prudence would not have done, or it is failing to do something which a man of ordinary caution and prudence would have done and it all depends on the circumstances surrounding the case at the time the act is done or at the time the person failed to do the act. Now that is clear enough when we come to [fol. 67] think about it. If a man has a race track of his own, he can get out and speed his car at 80 miles an hour if he wants to, or a hundred if it will go that fast and if nobody is near or in his way it would not be an act of negligence so far as other people are concerned. It might be very reckless, but if he speeded it down one of these crowded streets that would be an entirely different proposition because the circumstances are different. In this case the plaintiff has based his case upon the charge of negligence against the defendant company. I have read to you the specification of negligence and it does not make any difference to you or to me how negligent the Atlantic Coast Line R. R. Company may have been if such negligence was not a proximate cause of the death of Mr. Marshall. The plaintiff alleges that that negligence not only existed but that it was a proximate cause of his death. Now when we come to proximate cause you want to know something about that and it is pretty hard to define. It has been defined to be that which was directly and immediately effective in producing the injury complained of, and without which it would not have occurred. In this case applied to the death of Mr. Marshall, that which was directly and immediately effective in producing the death of Mr. Marshall, and without which his death would not have occurred.

It is the duty of the master, Mr. foreman and gentlemen of the jury to furnish the servant a reasonably safe place to work and I want to make that plain. Now I am not going to make the mistake attributed to me in the Youngblood case, which I don't think I made. I think there was some mistake about that. I don't mean an absolutely safe place in which to work but a reasonably safe place. It has been put in this way by some of the courts, that the mas-

[fol. 68] ter must use reasonable care in order to provide a safe place in which the servant has to work. Now that does not mean that he has got to have an absolutely safe place. It is common knowledge that there are some kinds of work in which men engage that is dangerous in itself. There are more or less dangers attached to the work and when we say a reasonably safe place. We have got to take into consideration the kind of work the man is called on to do. I think I may say that there is more or less danger connected with railroading and when we say a reasonably safe place we have got to take into consideration the kind of work that the man is required to do and it is not required of the master to make everything absolutely safe for the railroad employees who are to run that train, but only that they shall make it as reasonably safe, having regard for the nature of the work the employees have to do. There is also a duty that devolves on the servant to use reasonable care that he shall not be injured while in the performance of his duties and master and servant mean almost identically the same thing as employer and employee. When the servant takes employment under a master he assumes all those risks which are necessarily incident to the work about which he is engaged; for instance there may be a building going up in this town eight or ten stories high; now everybody knows that walking about up that high on narrow planks there is more or less danger attached to it but the carpenter can't do his work without a certain amount of danger attached to it and the law says when he takes employment under his master he has that in mind and he assumes all of those dangers which are necessarily incident to his work and if he is injured by one of those dangers which he assumes and not through any negligence of the master the law says you will have to suffer your own injuries and [fol. 69] you can't recover any damages against the master because that was your contract either express or implied to assume those risks and if you get hurt it is your lookout and the same way with operating these trains. When a man is in the employ of a railroad company he assumes those risks which are necessarily incident to his employment, and if he is injured by one of those risks he can't recover. Now, Mr. foreman and gentlemen, I have already said to you that the plaintiff in this case must make

out his case by the preponderance or greater weight of the evidence and if he does not do that then your verdict must be for the defendant. The defendant has asked me to charge you some propositions of law. I think I have covered most of them but I will read them over.

1. I charge you that the jury cannot consider the allegations of defendant's answer in regard to contributory negligence as evidence against it, and that the statements in paragraph 7 cannot be considered as evidence in this case.

Court: Now that brings up that same question again, I think, and I charge you that the statements of fact set out in paragraph 7 you may consider. As to any admissions whatsoever of negligence against the Atlantic Coast Line R. R. Co. you can't consider. It is only those statements of fact set out in paragraph 7 which facts they allege constitute contributory negligence. As I say, contributory negligence goes out of the case, but the facts set out there and upon which they sought to base their charge of contributory negligence you may consider. The rest of it you can't consider at all.

2. I charge you that the burden is upon the plaintiff to prove by the greater weight or preponderance of the evi-[fol. 70] dence that the defendant was negligent, or wilful, or careless, or wanton in the particulars alleged by him, and if the plaintiff fails to prove by the greater weight of the evidence that the defendant was negligent or wilful in the particulars charged by him in his complaint, then you must bring in a verdict for the defendant.

Court: The question of wilfulness goes out of the case and the question of wantonness goes out of the case under the statement of the plaintiff's attorneys and anything along the line of wilfulness or wantonness is not to be considered in the case.

3. I charge you that it has been proved and is undisputed in this case that the South Carolina Railroad Commission, by a resolution dated October 11th, 1916, and effective at the time of this accident, has prescribed the minimum of the clearance for the erection of obstructions along the sides of the railroad tracks in this state, and it appearing from the evidence of both the plaintiff, and the defendant,

that the defendant, Atlantic Coast Line Railroad Company has complied with this resolution of the Railroad Commission, I charge you that there is no negligence shown on the part of the Railroad Company in this case in the location of the signal post or semaphore in question, and if you find no other negligence in the case, you must find for the defendant.

Court: I refuse to charge you that.

4. I charge you that when one enters the employment of another in an occupation which is in itself a hazardous or dangerous one, by so entering this employment he assumes all of those usual and ordinary risks and hazards of his employment, and if he is injured by any one of those hazards or risks, he cannot recover against his employer [fol. 71] for the injury.

Court: That is correct and I so charge you.

5. I charge you that where one is in the employment of a railroad company and is injured by some permanent appliance or apparatus of the railroad company even if the jury believe that the railroad company may have been negligent in placing the semaphore mentioned in the complaint, the plaintiff cannot recover for the death of intestate if you further find by the preponderance of evidence that the location of the semaphore and risk of injury therefrom were obvious to intestate, or were known to and appreciated by him.

Court: I charge you that.

6. I charge you that if the injuries and death of the plaintiff's intestate, the deceased, were not due to any negligence or wilfulness (I strike out wilfulness) on the part of the railroad company, but were solely due to and caused by the negligence or carelessness of the deceased, then I charge you that the plaintiff in this action is not entitled to a verdict, and you must find a verdict for the defendant.

Court: I charge you that.

7. I charge you that under the Federal Employers' Liability Act the measure of damages recoverable are limited to such loss as results because the dependent relatives have

been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee. The damage is limited strictly to the financial loss sustained and is always the present cash value of the future benefits of which the beneficiaries were deprived by the death, making adequate allowance according to the circumstances, for [fol. 72] the earning power of money. The excess of the deceased over the amount reasonably to be expected to be contributed to the beneficiaries, cannot be reduced to a cash value and assessed as an element of damage.

If you should find a verdict for the plaintiff in this case, the verdict should be computed strictly in accordance with these instructions, and the plaintiff is only entitled to a verdict for the present cash value of what the deceased might reasonably have been expected to give to his wife and children, had he lived.

Court: I charge you that.

8. I charge you that this case is under the Federal Employers' Liability Act and that that act permits recovery upon the basis of negligence only. The defendant is not liable because of any defect of insufficiency in plat or equipment that is not attributable to negligence. The burden is on the plaintiff to show by reasonable evidence a breach of duty owed him by defendant in respect of the place where his intestate was killed and that in whole or in part his injuries resulted proximately therefrom, and that in this case the deceased, Mr. Marshall, assumed the ordinary risks of his employment and also extraordinary risks and those due to the negligence of his employer and fellow employees when obvious and fully known and appreciated.

Court: I charge you that.

Now, gentlemen, I believe that covers the law of the case.

Mr. Logan: I think in coming to their conclusions as to the pecuniary loss they have a right to take into consideration the mortuary tables which were put in evidence [fol. 73] which shows that Mr. Marshall had an expectancy of 27 or 28 years.

Court: Yes, they can take the tables to their room if they wish to.

Now, Mr. foreman whatever your verdict may be write it on the complaint, you can write it here in the complaint in the middle. And your verdict will be either we find for the plaintiff so many dollars, writing it out in words and not in figures, or we find for the defendant, and sign your name as foreman. I will give you the complaint and answer and if you wish you may take the mortuary tables with you.

IN COURT OF COMMON PLEAS OF CHARLESTON COUNTY

DEFENDANT'S EXCEPTIONS

1. The defendant excepts that his honor the presiding judge erred in admitting into evidence, over the objection of the defendant, the seventh paragraph of the defendant's answer, as follows:

"Seventh. Further answering said complaint, and for a further defense to said action, this defendant alleges that the injuries and death of the deceased were due to and caused by the negligence of the said deceased contributing to and combining and concurring with the alleged negligence of the defendant and constituting a proximate cause thereof, without which the same would not have happened, in the following particulars, to wit:

"(a) In not going directly to the roof of the freight car on which he was riding as instructed by the conductor of [fol. 74] said train, but in remaining on the side of the car, contrary to said orders and instructions.

"(b) In not keeping a proper lookout for the signal devices and other obstructions which are ordinarily erected on the side of tracks of the defendant, near said tracks.

"(c) In failing and omitting to keep a proper lookout for the semaphore mentioned in the complaint herein, whose presence and location were well known to the deceased.

"(d) In leaning outward from the ladder of said freight car so far as to bring his body in contact with the said semaphore erected at a greater distance from the track than is required by the regulations of the South Carolina Railroad Commission, hereinbefore set forth."

It being respectfully submitted that the facts alleged in the defendant's answer in the affirmative defense, to wit, contributory negligence, could not be used as evidence against it especially in this case where his honor charged the jury that there was no element of contributory negligence in the case.

2. That his honor erred in refusing to charge the defendant's first request to charge, as follows:

"I charge you that the jury cannot consider the allegations of defendant's answer in regard to contributory negligence as evidence against it and that the statements in paragraph seven cannot be considered as evidence in this case."

[fol. 75] and instead charging as follows:

"Now that brings up the same question again, I think, and I charge you that the statements of fact set out in paragraph seven you may consider. As to any admission whatsoever of negligence against the Atlantic Coast Line Railroad Company, you can't consider. It is only those statements of fact set out in paragraph seven which facts they allege constitute contributory negligence. As I say, contributory negligence goes out of the case, but the facts set out there and upon which they sought to base their charge of contributory negligence you may consider. The rest of it you can't consider at all."

It being respectfully submitted that the statements made in the affirmative defense of contributory negligence cannot be used as evidence against the defendant and further that if the jury were to consider the facts as pleaded in said paragraph they were also bound to take into consideration the fact alleged that plaintiff's intestate was negligent as therein set out.

3. That his honor erred in refusing to direct a verdict for the defendant on the ground that the plaintiff failed to prove any actionable negligence on the part of the defendant in this case, it being respectfully submitted that there is nowhere in the testimony any proof of negligence on the part of defendant.

4. That his honor erred in refusing to direct a verdict for the defendant upon the ground urged that the deceased

came to his death as the result of one of the risks assumed in his employment, to wit, the risk of striking the semaphore described in the testimony, the presence and location of which was well known to the deceased, and the alleged dan-
[fol. 76] ger and risk of which he saw, or by the exercise of ordinary care could have seen, and appreciated at the time of the accident, it being respectfully submitted that if the deceased was killed by striking a semaphore on the side of the track, that it was a risk he assumed when he accepted the employment as a switchman and a risk that was plain and obvious and which he could have seen and appreciated by the exercise of ordinary care.

5. That his honor erred in refusing to direct a verdict for the defendant because there is no evidence in this case at all as to how the deceased came to his death or as to the proximate cause thereof, it being respectfully submitted that there is no evidence showing how the deceased came to his death and it cannot be left to the jury to conjecture to a proximate cause of the death, but that the plaintiff is required to prove by the greater weight of the evidence how the deceased came to his death and the proximate cause thereof and to prove negligence on the part of the defendant.

STATE OF SOUTH CAROLINA:

IN THE SUPREME COURT

J. L. POWE, as Administrator of George A. Marshall, Deceased, Respondent,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, Appellant

PETITION

To the Honorable Thomas P. Cothran, Associate Justice of the Supreme Court of South Carolina:

The petition of the Atlantic Coast Line Railroad Company, respectfully shows:

1. That the final judgment of the Supreme Court in South Carolina in the above stated cause against your petitioner was rendered on 19th September, 1930, by an opinion affirming the judgment of the Court below.

2. That the said final judgment is subject to review by the Supreme Court of the United States on Writ of Certiorari, upon the grounds that the said final judgment denies to your petitioner rights, privileges and immunities granted to it under the constitution and laws of the United States.

3. Your petitioner further presents that the cause of action herein arises solely under the Act of Congress and Acts amendatory thereto commonly known as the Federal Employers' Liability Act, under which all questions of liability are finally determinable only by the Supreme Court of the United States, which has ultimate jurisdiction of questions of law and fact arising in such case.

4. That your petitioner, being the party aggrieved by the aforesaid judgment, desires to apply for a Writ of Certiorari from the Supreme Court of the United States, and in order to make such application and obtain such Writ it is necessary that the execution and enforcement of such judgment be stayed for a reasonable time.

5. That your petitioner stand- ready to give such security for the protection of the plaintiff in the above stated cause as may be necessary or proper.

Wherefore your petitioner prays that the execution and enforcement of the aforesaid judgment be stayed pursuant to the Acts of Congress in such case made and provided, and that your petitioner be allotted a period of ninety days in which to apply for a Writ of Certiorari from the Supreme Court of the United States.

Thomas W. Davis, Hagood, Rivers & Young, Attorneys for Atlantic Coast Line Railroad Company.

STATE OF SOUTH CAROLINA:

IN THE SUPREME COURT

J. L. POWE, as Administrator of George A. Marshall, Deceased, Respondent,

VS.

ATLANTIC COAST LINE RAILROAD COMPANY, Appellant

ORDER

The defendant, Atlantic Coast Line Railroad Company, having made application for stay of execution and enforcement of judgment in the above entitled cause for a reasonable time to enable it to apply for and obtain a Writ of Certiorari from the Supreme Court of the United States, it is

Ordered that the said defendant have ninety days from the date of said judgment within which to apply for a Writ of Certiorari from the Supreme Court of the United States and that the remittitur and execution and enforcement of judgment herein be stayed until final disposition of said petition for certiorari and until further order of this Court, provided the defendant shall file a bond with good and sufficient surety in the penal sum of one thousand dollars within ten days from the date hereof, conditioned to indemnify the plaintiff above named against all damages and costs

that he may sustain by reason of the stay if the defendant fail to make application for such Writ within the period allotted therefor, or fails to obtain an order granting its application, or fail to make good its plea in the Supreme Court of the United States.

It is further ordered that a copy of this order be served without delay on the plaintiff herein or one of his attorneys of record.

It is further ordered that this order be filed in the office of the Clerk of the Supreme Court of South Carolina.

T. P. Cothran, Associate Justice of the Supreme Court of South Carolina.

September 25, 1930.

THE STATE OF SOUTH CAROLINA:

IN THE SUPREME COURT

J. L. POWE, as Administrator of George A. Marshall, Deceased, Respondent,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, Appellant

BOND

Know all men by these presents that we, Atlantic Coast Line Railroad Company, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto J. L. Powe, Administrator of the estate of George A. Marshall, deceased, his heirs, executors, administrators, successors and assigns, in the penal sum of One Thousand ($1,000.00) Dollars, for the payment of which well and truly to be made, we and each of us bind ourselves and our successors, jointly and severally by these presents.

Sealed with our seals and dated this 30th day of September, 1930.

Conditioned, nevertheless, that whereas Atlantic Coast Line Railroad Company has applied to the Honorable Thomas P. Cothran, Associate Justice of the Supreme Court of South Carolina, for a stay of execution and enforcement of the final judgment rendered by the Supreme

Court of the State of South Carolina in favor of J. L. Powe, as Administrator of the estate of George A. Marshall, deceased, against Atlantic Coast Line Railroad Company, on to-wit, the 19th day of September, 1930, to enable the said defendant to apply for and obtain a writ of certiorari from the Supreme Court of the United States to review said judgment.

Now, therefore, if the defendant, Atlantic Coast Line Railroad Company, above named, shall answer for all damages and costs which the plaintiff above named may sustain by reason of the stay of the said judgment against said defendant, if the said defendant fail to make application for such writ within the period of Ninety (90) days from the date of said judgment, the same being the period allotted therefor, or fail to obtain an order granting its application, or fail to make good its plea in the Supreme Court of the United States, then this obligation to be void; otherwise to be and remain in full force and effect.

Atlantic Coast Line Railroad Company, by R. D. Cromly, Attorney in Fact. (Seal.) Fidelity and Deposit Company of Maryland, by J. Addison Ingle, Attorney-in-Fact. (Seal.)

Signed, sealed and delivered in the presence of W. M. Peck, V. E. Phelps, as to Atlantic Coast Line Railroad Company; John DuRant. Ashmore, Byrdee Armstrong, as to Fidelity and Deposit Company of Maryland.

Approved.

T. P. Cothran, Associate Justice of Supreme Court of South Carolina.

Oct. 4, 1930.

THE STATE OF SOUTH CAROLINA:

IN THE SUPREME COURT

Case No. 806. Opinion No. 12975

J. L. POWE, ADMR., Respondent,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, Appellant

Appeal from Charleston County

Hayne F. Rice, Judge

Filed Sept. 19, 1930

Affirmed

Hagood, Rivers and Young, of Charleston, for appellant.

Logan & Grace and Lionel K. Legge, all of Charleston, for respondent.

C. T. GRAYDON, A. A. J.:

This action was commenced in the Court of Common Pleas for Charleston County on the 30th day of May, 1924. The action was originally in the name of C. M. Tyner as Administrator of the Estate of George A. Marshall, as Plaintiff, against the defendant Atlantic Coast Line Railroad Company. The case has been twice tried and after the first trial C. M. Tyner died and by an order dated 19th of September, 1929, J. L. Powe was appointed administrator of the Estate of George A. Marshall and as such administrator was substituted as plaintiff.

The action was one admittedly under the Federal Employers Liability Act and the amendments thereto.

The case was first tried on October 10, 1925 and resulted in a verdict in favor of the plaintiff for the sum of Twenty-Eight Thousand Eight Hundred ($28,800.00) Dollars. An appeal was taken to the South Carolina Supreme Court which affirmed the decision of the lower Court.

Tyner, Administrator, v. A. C. L. R. Co., 149 S. C. 89; The defendant carried the case on a Writ of Certiorari to

the United States Supreme Court and the same was reversed and remanded for a new trial.

A. C. L. R. Co., v. Tyner, 278 U. S. 565, 73 Law. Ed., 508: The case was again tried at Charleston in October, 1929, before Judge Rice and a jury and resulted in a verdict in favor of the plaintiff for the sum of Thirty Thousand ($30,000.00) Dollars.

A full statement of the pleadings and facts developed on the first trial of the case can be found in Tyner, Administrator, against A. C. L. R. Co., *Supra,* and only a brief statement will here be made with such facts as were developed on the second trial of the cause which were not developed on the first trial. George A. Marshall was employed as a switchman by the defendant railroad company and on January 6, 1923, was killed while in such employment. He left surviving him a widow and three small children for whose benefit the action was brought under the Federal Employers Liability Act (45 U. S. C. A., paragraph 5159).

The first two paragraphs of the complaint cover the formal allegations as to the appointment of the administrator and for the benefit of whom the action was brought. The third paragraph of the complaint alleges the incorporation of the defendant; that at the time the defendant was engaged in interstate commerce and that the said George A. Marshall, while employed by said railroad corporation and while engaged in the duties incident to and growing out of his employment, met with an accident on or about the 5th. day of January, 1923 and was so badly injured as to cause his death. The fourth allegation of the complaint alleges that the action was brought under the provision of the Federal Employers Liability Act. The fifth and sixth allegations of the complaint were as follows:

"Fifth. On information and belief, that on said 6th. day of January, 1923, said deceased, George A. Marshall, was engaged in the performance of his duties as a switchman attached to an engine and train of cars moving over defendant's main line of tracks at or near the city of Charleston, state aforesaid, and in the direction of said city; that it was dark and foggy, the time being about three o'clock in the morning; that while proceeding as aforesaid at or about Five Mile Crossing, near said city the said engine

and train of cars were caused to be stopped by reason of trouble with the brakes on some of said cars, and that the said George A. Marshall in the course of his duty and employment got down to the ground to examine into and correct said trouble; that at or near the point where said engine and train of cars had stopped as aforesaid, defendant herein, Atlantic Coast Line Railroad Company, its agents and servants, in violation of its duty to furnish for the use of the said George A. Marshall a reasonably safe roadbed and track free from obstructions which might be placed on the side of the track, and to place and maintain signal devices at a reasonably safe distance from the track, so as not to extend over towards the track in such close proximity as to endanger the lives of its employees who might be running or operating its trains by said signal devices, had placed and maintained a signal device or obstruction too close to the track, and in such close proximity to the track as to leave an insufficient space intervening between it and the side of the train, and so close as to interfere with the proper operation of defendant's trains and the proper performance of their duties by its employees thereabout, so that upon said train proceeding forward, and while the said George A. Marshall was mounting the ladder of one of the cars attached or while he was examining the defective car as aforesaid, the defects in which were due to the negligence of the defendant herein, thereby necessitating that said decedent examine the same, and while thus engaged in the duties incident to his employment, he was struck by said signal device or obstruction and thrown from his train and so badly injured as to cause his death soon thereafter.

"Sixth. That the injuries and death of the said George A. Marshall were caused by the negligence, carelessness, recklessness, wilfulness and wantonness of said defendant, Atlantic Coast Line Railroad Company, its agents and servants, as aforesaid, and in the following particulars, to-wit:

"(a) In failing and omitting to furnish the said decedent a reasonably safe place to work.

"(b) In failing and omitting to furnish a reasonably safe roadbed and track free from obstructions.

"(c) In failing and omitting to place and maintain said signal device at a reasonably safe distance from the track.

"(d) In causing and allowing said signal device or obstructions to be placed and maintained too close to the track.

"(e) In causing and allowing said signal device or obstructions to be placed and maintained in such close proximity to the track as to leave insufficient space between it and the side of a train within which employees might safely perform the duties incident to their employment, and the proper operating of defendant's trains.

"(f) In causing and allowing said signal device or obstruction to be at the point, place and position the same was maintained.

"(g) In failing and omitting to notify or warn said decedent of the close proximity of said signal device or obstructions to the side of the train.

"(h) In causing and allowing a defective and bad order box car to be attached to and form a part of the train and to be transported by the engine to which decedent was attached.

"'(i) In causing and allowing said engine and train of cars to be run at a high and dangerous and excessive rate of speed within the yard limits and block system of defendant and in violation of its rules and regulations governing the same."

The seventh allegation was that George A. Marshall left him surviving his wife and three minor children who depended upon him for support and maintenance; that he was earning One Hundred and Eighty ($180.00) Dollars per month and was a young man of twenty-five (25) years, strong, healthy, and ablebodied, and that his death resulted in great pecuniary loss to said wife and children.

The eighth paragraph demands judgment in the sum of Fifty Thousand ($50,000.00) Dollars.

As the answer of the defendant is involved in the consideration of the exceptions made by the defendant, it is here given in full.

First. It admits the allegations of the first, third and fourth paragraphs, and so much of the second paragraph as alleges that the said decedent, George A. Marshall, on the 6th. day of January, 1923, and for some time prior thereto, was employed by the defendant railroad company in the capacity of switchman.

"Second. It denies each and every other allegation in said complaint not hereinabove or hereinafter specifically admitted.

"Third. Further answering said complaint and with specific reference to the subdivisions a, b, c, d, e, f, and g in paragraph sixth of the complaint, and the other allegations in the complaint referring to the semaphore hereinafter mentioned, the defendant alleges that heretofore, to-wit, on or about the 24th. day of May, 1916, the Railroad Commission of South Carolina in Circular No. 211, amending Circular No. 208 with regard to clearance, unanimously adopted the following resolution:

" 'Taking into consideration not only the safety of the general public and employees of the railroad, but for the further consideration that it is absolutely necessary for all railroad employees to give and receive signals;

" 'Be it resolved that no building, or platform, or other obstruction be allowed erected or maintained nearer than four feet of the outer edge of the nearest rail of the main or side track of any railroad in the State of South Carolina. This limit of clearance shall not apply to bridges already constructed, or to passenger station landings.'

" 'A copy of which was served upon the defendant by said Railroad Commission; also, that on or about October 11th, 1916, the Railroad Commission of South Carolina in Circular No. 216 with regard to clearances adopted the following resolution:

" 'Taking into consideration not only the safety of the general public and employees of the railroad, but for the further consideration that it is absolutely necessary for all railroad employees to give and receive signals;

" 'Be it resolved that no building, or platform, or other structure about station grounds be allowed erected or maintained nearer than four feet from the outside edge of the

main or side track of any railroad in the State of South Carolina, measurement being made at rail top level; and furthermore, that no obstruction be allowed erected or maintained at any point other than station grounds nearer than four feet from the outer edge of the main or side track rail of any railroad in the State of South Carolina, measurement being made four feet about the top of the rail.

" 'This limit of clearances shall not apply to bridges already constructed, or to passenger landings.'

"A copy of which was also served upon this defendant by the said Railroad Commission.

"Fourth. That this defendant complied with the terms of the said resolution in the erection of the semaphore mentioned in the complaint, the same being at a greater distance than four feet from the outer edge of the nearest rail of the track at the point as so required.

"Fifth. Further answering said complaint and for a further defense to the said action, on information and belief the defendant alleges that the injuries and death of the said George A. Marshall was due to and caused by one of the risks of his employment assumed in working for the defendant, that is to say, the risk of riding on the side of a freight car and of passing various obstructions such as signal devices, semaphores and the like, whose presence was known to him and the dangers of which were obvious and so assumed by him.

"Sixth. Subject to defendant's motion to strike out certain allegations of the complaint with reference to defects in certain of the freight cars on the said train mentioned in said complaint, and subject further to its motion to make said allegations more definite and certain, in various particulars, and saving and reserving all its rights under said motions, and further answering said complaint and for a further defense to said action, on information and belief, the defendant alleges that the injuries and death of the said George A. Marshall were due to and caused by one of the risks of his employment, assumed in working for the defendant, that is to say, the risk of the work of a switchman about cars, with defects arising in the ordinary operation of the cars, the occurring of such defects in such operation

being reasonably in the contemplation of the parties when the deceased undertook to work for the defendant, and said defects in this case being obvious and actually known to the deceased and ordinarily incident to his employment.

"Seventh. Further answering said complaint, and for a further defense to said action, this defendant alleges that the injuries and death of the deceased were due to and caused by the negligence of the said deceased contributing and combining and concurring with the alleged negligence of the defendant and constituting a proximate cause thereof, without which the same would not have happened, in the following particulars, to-wit:

"(a) In not going directly to the roof of the freight car on which he was riding as instructed by the conductors of said train, but in remaining on the side of the car, contrary to said orders and instructions.

"(b) In not keeping a proper lookout for the signal devices and other obstructions which are ordinarily erected on the side of tracks of the defendant, near said tracks.

"(c) In failing and omitting to keep a proper lookout for the semaphore mentioned in the complaint herein, whose presence and location were well known to the deceased.

"(d) In leaning outward from the ladder of said freight car so far as to bring his body in contact with the said semaphore erected at a greater distance from the track than is required by the regulations of the South Carolina Railroad Commission, hereinbefore set forth."

The plaintiff offered two pieces of evidence which were not given at the former trial which were vital to the plaintiff's case. The first was the testimony on the part of the witness C. C. Tyner, a brother-in-law of the deceased, who was in the employ of the A. C. L. Railroad and for that reason did not care to testify in the trial, who testified in substance that he knew the location of semaphore 3911; that on the morning of the 6th of January, 1923, he went to semaphore 3911 and examined the semaphore casing and surrounding conditions; that he found about four feet from the base of the semaphore something had apparently wiped the smoke and the soot from the semaphore and about six

(6) or seven (7) inches further there were apparently blood stains on the north side of the semaphore casing; that he examined the body of Marshall and found a pad on the back of the head and two blood clots on each side of the pad and the head was crushed in and soft; that switchmen and brakemen are supposed to rider wherever their duties call them on the train; that a car moving at the rate of twenty (20) or twenty-five (25) miles an hour would have from ten (10) to twenty (20) inches sway in it; that he arrived at the scene of the accident about noon or a little after noon on the 6th of January along with a Mr. J. H. Lee.

In the first trial there seemed to have been some question as to whether or not Marshall was actually killed by coming in contact with the semaphore post. There was no evidence offered showing any blow to any part of his body which might have been caused by striking the semaphore post. Between the first and the second trial the body of Marshall was exhumed by Dr. Powe who performed an autopsy. The skull was removed and actually produced in Court. The back of the head was crushed in, its condition indicating that it had received a terriffic blow near the place it joined with the spine. The neck was broken and the head was "disarticulated" from the spine. This new evidence was important to the plaintiff because it showed that the semaphore was struck and had blood upon it as well as other marks and that the skull of the deceased received a terriffic blow at the base of it sufficient to crush it in and sever the head from the spine. All doubt was removed as to whether Marshall was actually killed by contact with the semaphore post.

The exceptions of the defendant are five in number which will be taken up in their order.

Exception 1 alleges error on the part of the Circuit Judge in admitting in the evidence, over the objection of the defendant, the seventh paragraph of the defendant's answer set forth supra.

In the consideration of this exception it is well to note that the answer of the defendant was not a general denial but was a qualified denial. The second paragraph of the answer states: "it denies each and every other allegation in said complaint not hereinabove or hereinafter specifically admitted." It will be seen from the wording of the para-

graph of the answer and a consideration of the decisions of this Court that the answer was not a general denial under the rule laid down by this Court, Judge Cothran speaking, in the case of Blake against Southern Railway, 126 S. C., 407. The Court there said:

"The so-called general denial in the first defense is limited by its terms to such allegations as may not 'hereinafter be admitted'; those that are admitted, including the allegations of interstate employment, are excepted from the force of the general denial by its terms."

Nowhere in the answer of the defendant is it denied that the plaintiff's intestate came to his death while doing the things which were alleged in the complaint in part. In fact, the answer of the defendant expressly affirmed and admitted that he was killed and then set forth in paragraph 7 and stated in what respects he was negligent and stated the facts upon which such conclusions were based.

It is true that where there is a general denial and afterwards inconsistent defenses are set up this Court has held repeatedly that the facts stated in such inconsistent defenses are not substantive facts by way of admissions but where the denial is qualified as it is here and admissions are made in the answer of the defendant which are not specifically denied in a denial, this Court has held that such admissions are competent in evidence insofar as the same refer to facts and not legal conclusions. This is the rule laid down in the case of McJimpsey against Southern Railway, 89 S. C. 122, where an answer somewhat similar in form to the answer here under consideration is construed. This rule has also been recognized in the Federal Court where it has been held that the scope and sufficiency of the pleadings are governed by the practice of the states in which the trial is held.

Glenn v. Sumner, 132 U. S. 152, 33 Law Ed. 301. Following the decisions of both Federal and State Courts the matters set up in an affirmative defense where there has been no general denial but where the defendant has plead, denying only such matters as were not thereinafter specifically admitted, such admissions on the part of the defendant there may be offered in evidence by the plaintiff.

The second exception complains of error on the part of the Circuit Judge in refusing to charge as follows:

"I charge you that the jury cannot consider the allegations of defendant's answer in regard to contributory negligence as evidence against it and that the statements in paragraph 7 cannot be considered as evidence in the case."

This exception is disposed of by the disposition of exception 1.

The third exception alleges error on the part of the Circuit Judge in refusing to direct a verdict for the defendant on the ground that no actionable negligence had been proven on the part of the defendant in the cause.

A careful analysis of the evidence is convincing that this exception cannot be sustained. It was shown that the base of the semaphore was four feet ten inches (4′ 10″) from the track, only ten (10) inches more than the minimum allowed by the Railroad Commission; that when the train was running twenty or twenty-five miles an hour the car swayed from eight (8) to twenty (20) inches. Under the testimony the car projected beyond the track a distance of two feet four inches (2′ 4″) with the latter two and one half (2½) inches more, making a total projection of two feet six and one-half inches (2′ 6½″); that when the car was at rest the clearance between the semaphore and the ladder was two feet — and one-half inches (2′ 3½″); that the clearance when the car was moving at a rate of twenty (20) or twenty-five (25) miles per hour would be from one foot seven and one-half inches (1′ 7½″) to seven and one-half (7½″) inches. Taking into consideration the swaying, of course, and the thickness of a man's body, the jury could have well concluded that the semaphore was placed within an unsafe distance of a moving train.

This is distinguishable from the case of Southern Pacific Company against Berkshire, 254 U. S., 415, 65 Law Ed., 335, where the engineer was killed by being struck on the head by a mail crane while leaning out the window of his cab. The crane had been erected in accordance with the regulations of the post office department. The Court there stated that the decision was confined to the case of postal cranes. There are but a few postal cranes along the route of an engineer. At each one of them the train on occasions

"snatches" mail and they are clearly visible and known to the engineer as he approaches them. It is as much his duty to know of the existence of the postal cranes as it is his duty to know of the existence of a crossing and an engineer assumes the risk of being struck by one of these cranes which he passes constantly. The case of a semaphore is entirely different, for who could expect a switchman or brakeman or trainman to know the exact location of these posts and boxes which are sometimes close together and which are placed at regular and irregular intervals all along the railroad Right of Way. The case of Chesapeake & Ohio Railroad Company against Leitch is another case involving a mail crane and follows under the same proposition as announced in the Berkshire case.

It might be well here to consider also that if a mail crane was put further back that it would be impossible for it to perform the functions for which it is intended, to-wit: "Snatch" the mail from the mail cars. The mail crane must of necessity be in close proximity of the Right of Way and it would be impossible for the railroad company to place it in any other position and in addition would be in direct violation of the postal regulations.

In the absence of proof that it was fully known and appreciated by him, we do not think that the deceased assumed as a matter of law, such an extraordinary risk as this, a risk which the railroad company could have by due care avoided.

The defendant company invokes the order of the railroad commission in substantiation of its position with reference to the placing of the semaphore post. These regulations are not conclusive for the reason that they merely state the minimum distance which obstructions are allowed to be placed from the outer edge of the rail whereas the postal regulations state the exact distance that the mail crane must be placed. There was nothing to prevent the defendant from placing the semaphore post further back if it knew or should have known that it was dangerous in the position which it was.

This also disposes of the fourth exception as to assumption of risk.

The fifth exception alleges error in the refusal of the Circuit Judge to direct a verdict for the defendant on the

ground that there was no evidence showing how the deceased came to his death, or as to the proximate cause thereof.

There are very few cases where a trainman is killed that can be proven except by circumstantial evidence. Very seldom is more than one man sent to perform a particular duty on the train and if he is killed there is usually no living eye witness to testify, and only the mute, unmovable circumstances can be adduced to show the cause and manner of his death. In the consideration of this matter it must be kept in mind that the degree of proof required of circumstantial evidence is not and should not be as great in civil cases as in criminal cases. In criminal cases the presumption of innocence arises in favor of the defendant and the circumstances must be of such force and character as to convince the jury beyond a reasonable doubt of the guilt of the accused. In civil cases where there is no presumption and where the proof merely has to be by the preponderance or greater weight of the evidence it would be harsh and unjust to hold that the criminal circumstantial rule should be invoked. The weight to be given to the circumstances should be determined by the jury and if from that weight they determine that the plaintiff has proven his case by the preponderance of the evidence, such finding should not be disturbed.

Fortunately, for the plaintiff in this case, the circumstances are so many and so well knit together that a Judge would be required to submit the facts and circumstances to a jury even in a criminal case. We have a strong young man twenty-five years of age, healthy and able-bodied, in good health and apparent good spirits at the beginning of the trip with no known physical infirmity or defect; he is found dead beside the railroad track a few moments after having been seen alive by his companions. The dew on the ground is disturbed, the semaphore post shows unmistakable evidence of having been struck and there is evidence of human blood upon it; the skull of the deceased is found crushed, evidently from a lick of some terrific force. This tends to establish the rate of speed of the train, the fact that the post was too close to the track, that the deceased was on the side of the car riding where he had a right to ride and where his duty often called him to ride and at a place provided for him to ride upon, that the cars were

swaying and that his head came into collision with the semaphore post with a terrific blow and caused him to be killed. Foggy and dark, the eye of man could not see and the eye of God will not disclose the exact manner of his death but these mute and silent circumstances, unchanged and unchangeable, speak silently of the manner and circumstances thereof.

This case is a much stronger case than the case of Chicago M. & St. P. R. Co. against Coogan, 271, U. S., 472, 70 Law Ed. 1041. In the Coogan case the deceased was found near the west end of the second car from the caboose, lying parallel with the track outside the south rail and on or at the ends of the ties. There were indications to show that he had been between the rails; that he had been run over by the east truck of the car next to the cab; that his left leg and arm had been crushed between the wheel and the rail and that his body had been dragged about fifteen feet.

The theory of the plaintiff was that Coogan stepped between the rails with his right foot, leaving his left foot outside the south rail between the south rail and a certain pipe line; that he stooped to raise the air hose, his left foot slipping backwards under the bent pipe; that before he could make the coupling the car started backwards to clear the switch and that as he attempted to straighten up his left foot was caught under the pipe and he was forced backward, run over and killed. The sole ground of negligence was the presence of the bent pipe along the track of the defendant. Coogan's shoes were removed from his feet and placed in a garage where they remained for a number of days before they were examined. The condition of the left shoe before the accident was not known and several days afterwards a rounding depression was noticed on the counter of the shoe. There was no evidence as to the condition of the shoe before the accident. There was no evidence that the shoe had been kept in the same condition after the accident. Assuming that the depression in the shoe counter was made by contact with the bent pipe, there was nothing to indicate that it was made before or after he was knocked down by the train. There was nothing to indicate whether the depression was not made some time before. Suppose the shoe had been torn, the foot had been lacerated and on the pipe

had been found leather from the shoe and blood from the foot, the case would not have then been as strong as the case here under consideration.

The present case reversed and remanded for a new trial by the United States Supreme Court under the authority of the following cases:

Chicago, M. & St. P. R. Co., v. Coogan, Supra;
Sou. Pac. Co. v. Berkshire and Chesapeake & Ohio Co. v. Leitch, Supra;
Gulf, C. & S. F. R. Co. v. Moser, 275 U. S., 133, 72 Law. Ed. 200, 48 Sup. Ct. Rep., 49.

The first case, Coogan, is on the question of the quantity and quality of the evidence and, as I have attempted to demonstrate heretofore, the case now under consideration is a much stronger case than the Coogan case. In the Coogan case there was presumption built upon presumption, supposition upon supposition; at best the case was only a good theory and not sustained by any positive facts.

The Berkshire case and the Leitch case are both on the question of assumption of risk and, as I have attempted to demonstrate, do not control this case. It is well to note here also that at the former trial, Tyner against A. C. L. R. Co., Supra, there was a question as to the charge upon assumption of risk. This is disposed of at pages 105-108 inclusive of that decision. There is no question here as to any error in the charge with reference to assumption of risk and if the United States Supreme Court intended to direct a verdict on the ground of assumption of risk it is not so stated in its decision. I cannot but feel that the United States Supreme Court intended just what was written in the decision, to remand the case for a new trial on this ground.

The Moser case is with reference to the measure of damages and as to error in the charge in the Tyner case. There is no question that under the Federal Rule, as applied to the Federal Employers Liability Act, the Judge in the first trial clearly failed to charge the proper measure of damages. The decision of the United States Supreme Court was that the case should be reversed and remanded for a new trial, having in mind the questions which are decided in the cases cited.

In passing it might be well to consider for a moment the reason for the passage of the Federal Employers Liability Act. It was passed for the purpose of enlarging, not limiting the rights of the employees to recover against railroad companies when engaged in interstate commerce. Numbers of rights were conferred by this Act of Congress which did not exist prior to its passage. The plaintiff was permitted to bring his suit in the State Courts and not to be subject to removal to the Federal Court. He was to be relieved of the burden of being carried out of the County of his choice into the Federal Court where it would be both inconvenient and expensive to carry on the litigation. The doctrine of fellow-servant was abolished entirely by the terms of the Act itself. Contributory negligence ceased to be a complete defense as it is under the South Carolina law but could be considered in diminution of damages only under the standard fixed by Congress in the trial of these cases. The suit was limited in favor of those who were dependent upon the deceased or the injured person for support, clearly indicating that it was the purpose of Congress to grant that broad and comprehensive relief to the dependents of one killed or injured in the service of his employer which was not permitted formerly under the State and Federal decisions. It was to be a shield to the working man to give him additional security that upon being killed in the line of his duties his dependents would not suffer by reason of it. The amount of recovery was limited to actual damages so that the scope of the act could not be enlarged by capricious or prejudiced jurors. The appeal was made ultimately to the highest Court in the land so that this great Judicial body could overlook and supervise the operation of the Act in accordance with the intention of its framers. It was and is one of the most progressive steps in Legislation of the Twentieth Century and stands today a monument to the progressive and humanitarian spirit which is characteristic of this new Century. Thousands of men have been benefited by its terms and thousands more will be benefited by its terms in the future. I feel that a construction should be given, broad and comprehensive, to carry out the real intent of the framers of the act and yet circumscribe it with such rules of law as will amply protect the employer under its terms.

All of the exceptions are, therefore, overruled and the case is affirmed.

(Let the exceptions be reported.)

Blease, Stabler and Carter, JJ., concur. Cothran, J., dissents.

COTHRAN, J. (dissenting):

Upon the former trial of the case, the defendant moved for a directed verdict upon the ground that the evidence as to the cause of decedent's death was wholly speculative and insufficient to show the proximate cause of his death.

In over-ruling the exceptions raising this issue, the Court in the opinion reported in 149 S. C. 89, made the following observations, in which I have italicized the evidence which appeared in that trial and which did not appear in this:

"We have already called attention to some of the evidence given in this case; we do not deem it necessary to review the entire testimony. Much of the evidence was circumstantial, but, taken as a whole, it was amply sufficient to carry the case to the jury. As stated, the evidence tended to show that the brakes on one of the cars were defective, a condition sufficiently dangerous to have caused a wreck; that this condition was discovered by the switchman, Marshall, who called the conductor's attention to it; that the train was stopped, and these two men attempted to rectify this defective condition; that the conductor did rectify same, as he thought, and went back to a place of safety; that the switchman did not return at once to the top of the car where he generally rode, but, inferentially, remained on the ladder attached to the side of the box car for the purpose of further watching and noting whether the brakes would work properly or continue to 'stick' and that the train of cars, running at a rate of from 20 to 25 miles per hour, which caused a sway of the empty box cars from 8 to 20 inches, passed the signal device located on the roadbed of the appellant while Marshall was on the ladder, and that thus he came in contact with the semaphore and was knocked from the ladder and killed * * *

"As we have already pointed out, the conductor testified that the last time he saw Marshall, which was before the

semaphore was reached, he was going up the ladder, and that he was found dead some feet from the semaphore. The testimony further tended to show that the dew had been brushed from the base of the semaphore, apparently through contact with some object. We think that the testimony, when considered as a whole, amply justified the jury in drawing the inference contended for by the respondent, that the decedent came to his death by reason of his being knocked from the ladder by the semaphore, and in drawing the further inference that, as *the switchman knew of the danger arising from the 'sticking' of the brakes, he had remained on the ladder for a few moments after the cars started in order to see whether the defective condition had been remedied, and whether there was any further danger from this cause, and that in so doing he was acting within the scope of his duties.*"

An examination of the record will show that not one of the facts above underscored, upon which this Court relied in its opinion, was presented upon the trial, from the result of which this appeal comes.

The plaintiff however did present the testimony of C. C. Tyner a brother-in-law of the deceased to the effect that about 1:30 P. M. of the day of the accident, (it having occurred in the early hours of the morning of that day, before day-light), upon an examination of the semaphore, he discovered about four feet from the base that something had apparently wiped the smoke and soot from the semaphore and that about six or seven inches higher up there were apparently blood-stains on the north side of the semaphore casing; that he examined the body of the deceased and found a pad on the back of the head and two blood-clots on each of the pad-; that the head was crushed in and soft.

The plaintiff, a physician also testified that he assisted in exhuming the body between the two trials, presented the skull in evidence, and testified that the back of the head was crushed in as if from a severe blow.

These witnesses were not produced and examined at the first trial; and it is contended that their testimony, complementary to the circumstances above indicated in *italics*, made it an issue of fact for the jury, whether the death of

the deceased was caused in the manner alleged. The vice in this contention is that *the circumstances referred to were not in evidence upon the second trial.*

The theory of the plaintiff's case, as indicated by the allegations of the complaint and by the argument of counsel, is as follows:

1. That the brakes on a certain car were defective;

2. That the train was stopped to repair the defect;

3. That as the train moved off the deceased mounted a ladder on the side of a box car to see that the brakes had been properly repaired.

4. That as the train passed the semaphore the deceased came in contact with the semaphore and was killed.

As to the first three elements of the theory there is not a particle of evidence; as to the fourth, there is none other than the facts that the body of the switchman was found alongside of the track, some 25 feet south of the semaphore, the back of his head crus-ed in as from a severe blow; that there were apparently, (discovered some 12 hours in the day), blood-stains upon the north side of the semaphore casing, about 4½ feet from the base; and that the dew, dust or soot had been wiped off by something at a point 4 feet from the base.

It does not clearly appear that the spots upon the semaphore were blood-stains; in fact it is inconceivable that if, as theorized, the de*d*eceased, as the train moved off, climbed upon the ladder of a box car to watch the brakes which were defective and had been repaired, and was struck in the back of the head by the semaphore, blood would so quickly have spurted out and stained the semaphore; the removal of the dew, dust or soot can mean nothing.

There is not a particle of evidence that he was on a train or car at or shortly before the time he was killed, or was on the top or side of a moving car, or on a ladder or in any other position, moving or standing, where he could have been struck by the semaphore.

In connection with this phase of the case it is interesting to note the case of R. Co. v. Coogan 271 U. S. 472, one of the cases cited by the Supreme Court of the United States upon the authority of which the judgment of this Court was

reversed. The Court must have cited it in sustaining the defendant's position that there was not sufficient evidence that the deceased met his death by means of some instrumentality of the railroad company, as that was the main point decided in the Coogan case.

In that case, quoting from the opinion:

"At the close of all the evidence, petitioner moved the Court to direct a verdict in its favor, on the ground among others, that respondent had failed to prove any actionable negligence on the part of petitioner, and that any verdict for respondent would be based upon speculation and conjecture."

The motion was denied; a verdict for the plaintiff followed which was affirmed by the Snpreme Court of Minnesota and upon certiorari was reversed by the Supreme Court of the United States upon the ground taken by the railroad company, that "the evidence" is not sufficient to sustain a finding that any negligence on its part caused or contributed to cause the death"; the Court holding:

"The kind or amount of evidence required to establish it, is not subject to the control of the several states. This Court will examine the record, and if it is found that as a matter of law, the evidence is not sufficient to sustain a finding that carrier's negligence was a cause of the death, judgment against the carrier will be reversed"; a rule recognized by this Court in the case of Shiver v. R. Co., opinion filed April 3, 1930 and not yet reported, and in which the Court said: "The evidence as to his death, and as to the cause of it, was speculative and it was not sufficient to show the proximate cause thereof."

The facts of the Coogan case are sufficiently detailed in the opinion of Mr. Justice Graydon and I need not repeat them. In fine the Court held that there was a hiatus in the proof in that it did not appear that the foot of the deceased was caught in the admittedly defective pipe line, the Court saying:

"As there is no direct evidence, it is necessary to determine whether the circumstances are sufficient to warrant a finding of that fact. Whenever circumstantial evidence

is relied upon to prove a fact, the circumstances must be proved and not themselves presumed."

To sustain the plaintiff's theory that the deceased came in contact with the semaphore, the circumstances, of which there is not a particle of evidence, must be presumed; that the brakes were defective; that the train was stopped to repair them; that the deceased climbed the ladder and was leaning out in his investigation of the brakes after the train started. Even with some if not all of these circumstances appearing before the Supreme Court of the United States, it cited the Coogan case in support of its reversal. With how much more reason would it do so in the absence, upon the present trial, of every circumstance except that the deceased might have received his wound under the circumstances stated which only exist by unsupported presumption or assumption.

In Northern R. Co. v. Page, 274 U. S. 65, the Court held:

"Under familiar rules, plaintiff was entitled to prevail if the evidence and the inferences that a jury might legitimately draw from it were fairly and reasonably sufficient to warrant a finding in his favor. Otherwise the judgment must be for the defendant. (Citing the Coogan case.) The verdict cannot be sustained if essential facts are left in the realm of conjecture and speculation." (Citing R. Co. v. Mills 271 U. S. 347.)

It is insisted on behalf of the plaintiff however, that the seventh paragraph of the defendant's answer, in which its plea of contributory negligence was amplified, and which was admitted in evidence by the presiding Judge over the defendant's objection, contains specific allegations to the effect that the deceased was ordered by the conductor to ascend the ladder on the side of the car and take a position upon the roof; that instead of doing so he remained upon the ladder and leant outward from it so far as to bring his body in contact with the semaphore, which was erected even a greater distance from the track than is required by the regulations of the State Railroad Commission; and that these allegations supplied the hiatus in the evidence which the defendant now asserts to exist.

It is conceded in the opinion of Mr. Justice Graydon that where the defendant sets up a general denial to the allega-

tions of the complaint and follows it with an affirmative defence containing allegations of fact inconsistent with the general denial, in the nature of admissions of fact stated in the complaint, such allegations of fact are not admissible in evidence on behalf of the plaintiff to sustain the allegations of the complaint; he insists however that where the denial is qualified as he claims it to be in the present case, such allegations of facts are admissible for the purpose stated.

In support of this proposition the learned Justice cites two South Carolina cases which I do not think at all sustain the proposition, namely McJimpsey v. Southern Ry. 89 S. C. 122, and Blake v. Southern Ry. 126 S. C. 407.

In the McJimpsey case the action was against certain railroad company which had leased its property to another company upon a cause of action which arose in North Carolina, based upon the negligence of the lessee company toward a passenger. The lessor company, the defendant in the case, moved for a non-suit upon the ground that there was no evidence tending to show any delict upon its part and the alleged injury having occurred in North Carolina it did not appear that under the laws of that State the lessor company was liable for the delicts of the lessee company. But in the answer of the lessor company containing allegations intended to show that the injury was due solely to the negligence of the passenger, it was admitted that the passenger at the time of his injury was on a train of the lessor company. This allegation had followed a paragraph in the answer which denied "every material allegation of the complaint". The Court held it was doubtful whether this constituted a good general denial because of the qualification leaving it uncertain what the defendant considered material; but passing that by as no motion to make the answer definite was made, the allegation in the answer that the occurrence was upon a car of the defendant was considered an admission on the part of the defendant.

It is apparent that the admission in the answer was not made in the statement of an affirmative defence.

In the Blake case the situation was entirely different as appears from the syllabus which correctly reflects the con-

clusion of the Court. It is there stated that where in an action under the Federal Employers' Liability Act the plaintiff alleged the interstate employment of the plaintiff and the defendant's general denial was limited to such allegations as may not thereinafter be admitted, and the defendant's second defence specifically stated that the plaintiff was employed by the defendant in interstate commerce, the interstate employment was an admitted fact.

In Bliss on Code Pleading, (3rd Ed.) section 331, it is stated that while there is criticism of an answer which denies each and every allegation of the complaint not expressly admitted or denied, the defect does not exclude evidence supporting the denial, but that the remedy of the plaintiff is to require the answer made more definite. The author further states that there can be no valid objection to an admission of certain facts and a general denial of all others, provided it distinctly appears what facts are admitted and what denied.

In Bessemer Co. v. Woolley (Col.) 105 Am. St. 91, a denial of each and every allegation of the complaint not theretofore specifically admitted was held good as a general denial.

So in Comes v. R. Co. (Iowa) 43 N. W. 235 where the denial was of each and every other allegation contained in said petition not hereinbefore admitted.

So in Calhoun v. Hallen 25 Hun. (N. Y.) 155 where the denial was of each and every allegation set forth in the complaint except as herein admitted, qualified or explained.

So in Rouscher v. Hudson 4th Ohio Dec. 291 where the denial was of each and every other allegation and averment in said cross petition contained except as hereinbefore expressly admitted or denied.

So in Pittinger v. Association 44 N. Y. S. 124 where the denial was of each and every allegation in said complaint contained not hereinbefore or hereinafter admitted, denied or controverted.

So in Leuddenman v. Rudolf (Oregon) 155 Pac. 172 where the denial was except as hereinafter admitted, stated or qualified the defendant denies each and every allegation within the amended complaint of the plaintiffs contained.

So in Childers v. Bank (Ind.) 46 N. E. 825 where the paragraph of an answer denied every allegation of the complaint not admitted in such paragraph.

Under these authorities I do not think that there can be a question but that the denial in the present case was a general denial, subject perhaps to a motion by the plaintiff to make it more definite and certain, in the absence of which, it will prevent the admission of the defendant in his affirmative defence being used against him in support of the plaintiff's case. This seems to be the rule in Stanley v. Shoolbred 25 S. C. 181, Brock v. Nelson 29 S. C. 49, Gilreath v. Furman 57 S. C. 289, Charping v. Toxaway 70 S. C. 470, Hickson v. Early 62 S. C. 42, Glenn v. Sumner 132 U. S. 152.

In the case of Glenn v. Sumner 132 U. S. 152, the Court said:

"This explicit finding cannot be controlled by statements of fact in those parts of the answer which set up as independent defences matters in avoidance, or in a bill of exceptions relating to one of those defences only. Such statements, made for the purpose of presenting the issue to which they relate are not evidence upon any other issue in the same record. As held by Chief Justice Marshall, sitting in the Circuit Court for the District of North Carolina, where the law authorizes a defendant to plead several pleas, he may use each plea in his defence, and the admissions unavoidably contained in one cannot be used against him in another."

In Hickson v. Early 62 S. C. 42, the Court citing the Glenn v. Sumner case said:

"The same principle would, of course, apply to a case in which separate and distinct defenses are set up in the answer, and there is a demurrer to two or more of the several defences, which is the case here. See Stanley v. Shoolbred, 25 S. C., 181, where it was held that where the defendant pleads a general denial and a further defense by way of confession and avoidance, the admissions made in the latter defense cannot be used by plaintiff to establish the issues raised by the general denial."

In Lee v. Robinson (C. C. A.) L. R. A. 1916-C 358, the Court also citing Glenn v. Sumner, said:

"It is true that, where the law authorizes a defendant to set up several pleas, he may use each plea in his defense,

and the admissions unavoidably contained in one cannot be used against him in another."

In Smith v. Gale 144 U. S. 509, the Court also citing Glenn v. Sumner, said:

"It is true that when a general denial is pleaded in connection with a special defence of new matter, or two inconsistent defences are set up, the admissions in the one cannot be used to destroy the effect of the other."

In Wyoming Co. v. Buffalo Co. (WY.) 166 Pac. 391, it was held quoting syllabus:

"Admissions contained in a defense of new matter requisite for the introduction of such new matter in defense are not inconsistent with a denial pleaded in a separate defense in the same answer, and cannot be used to defeat such denial; hence a defendant may both deny and avoid, although the avoidance is a tacit admission of what is denied."

In Rudd v. Dewey, 121 Iowa, 454, 96 N. W. 973, the Court said:

"But even in states where inconsistent defenses are not allowed, the remedy is by motion to strike or to require an election; and, if the two defenses are allowed to stand, the colorable confession in one division, which is introduced or impelled in order to support matter in avoidance, does not waive the general denial pleaded in another."

In 2 Enc. Law & Practice it is said:

"While there is some conflict on the question, the great weight of authority, both at common law and under the statutes, favors the doctrine that, where several inconsistent pleas are filed, the admissions in one are not competent as evidence to rebut a repugnant averment in another."

The authorities upon which the author arrives at this conclusion are cited in the notes. In 1 Elliott on Evidence, section 236, it is stated:

"There is much reason in support of the view that where the law authorizes a party to plead in his way, as, for instance, where it authorizes him to set up independent and

even inconsistent defenses in different paragraphs of answer, the statements in a particular paragraph are made for the purpose of presenting the issue to which they relate, and no other, and to permit them to be used against the pleader on another issue would deprive him of his denials or at least make it dangerous for him to do what the law authorizes him to do. He may, for instance, plead by way of denial in one paragraph and by way of confession and avoidance in another, and it would seem unjust to permit his unavoidable and, in a sense, conditional admissions in the latter paragraph to be taken as admissions upon the issue raised by the denial. This seems to be the view taken by most of the courts by which the question has been expressly decided."

In Pomeroy's Code Remedies (3rd Ed.) section 724, the rule is stated:

"When a denial is pleaded in connection with a defense of new matter, or two defenses of new matter are set up, the admission in the one can never be used to destroy the effect of the other. The concessions of a defense by way of confession and avoidance do not obviate the necessity of proving the averments contradicted by the denial. This rule is universal. Even in those states where inconsistent defenses are not permitted to stand, the remedy is by striking out, or by compelling an election, and not by using the admissions of one to destroy the issues raised by the other."

See extended note 14 A. L. R. 80.

I think therefore that the admission in the defence of contributory negligence, can add nothing to supply the fatal hiatus in the evidence, and that clearly the presiding Judge was in error in admitting the seventh paragraph of the answer in evidence. In passing, it appears anomalous to practically strike the defence of contributory negligence from the answer and allow the use of a part of it an an admission of a material fact which the plaintiff was obliged to prove.

But assuming for the moment that the evidence shows that the train was equipped with a defective brake in one of the cars; that before reaching the semaphore the train was stopped and the brake repaired; that the deceased was

not entirely satisfied with the efficiency of the repairs and mounted the ladder to observe the action of the brake after the train started; that while engaged in that duty he leant over far enough to come in contact with the semaphore and was killed; I think that his death cannot be charged to the railroad company.

It is conceded that the semaphore was constructed at a greater distance from the nearest rail than four feet, the minimum distance fixed by the order of the Railroad Commission which had jurisdiction of such a regulation.

It has been consistently and properly held by this Court that the failure of a railroad company to comply with a regulatory statute in the operation of its trains, the signaling statute for instance, is negligence per se. and in the McBride case, 140 S. C. 260, it was decided, not only this, but that it created a presumption that the failure was the proximate cause, (a conclusion with which I did not agree in that case). It would appear logical and just therefore that when the railroad company complied with the statute or authorized regulation, it should be entitled to a similar presumption of due care.

I do not contend that the railroad company, in every instance, is absolved by showing compliance with such a regulation; circumstances may be presented which call for additional precautions, and I think that such has been holding of this Court. At any rate, such circumstances must be made to appear.

It is declared in the opinion of Mr. Justice Graydon that there was evidence from which the jury would have been justified in concluding that the semaphore was placed "within an unsafe distance of a moving train." This declaration is based upon the theory that the clearance between the side of a car standing at rest upon the track opposite the semaphore was 30 inches; that this clearance was reduced by the thickness of the ladder, 2½ inches, leaving 27½ inches; and that it was further reduced by the swaying of a car from side to side, in a train running at the rate of 25 miles an hour from 8 to 20 inches; that if the swaying was 8 inches, the clearance would have been 19½ inches; if 20, 7½ inches; and that considering the thickness of a man's body, the semaphore was placed too close to the track.

As applied to this particular case, the theory is based upon several assumptions, none of which appear in the evidence; that the deceased was upon the ladder; that the train was running 25 miles an hour; and that the sway of the passing car was so many inches.

There is no evidence how far the train stopped north of the semaphore, if it stopped at all; there is no evidence where the deceased mounted the ladder, if indeed he mounted it at all; there is no evidence that between the assumed stopping and the assumed mounting, the speed of the train had reached 25 miles an hour; there is no evidence as to how great the swaying of the car was or that the swaying, alternately as it appears, was toward the semaphore. It is all speculation and conjecture.

It is difficult if not impossible to differentiate the facts and conclusions which I think should be drawn in this case, from those in the case of Davis v. R. Co. 21 S. C. 93, which has been cited in many cases with approval by this Court, mainly upon other points. There the deceased was upon top of a car with a lantern flagging an approaching train; the cup of his lantern dropped out and he descended into the caboose to get another lantern; supplying himself with it he attempted by means of a ladder on the side of the caboose to return to his post on top; as he was ascending the ladder he was struck by the timbers of a water-tank and killed. There was evidence tending to show that the timbers were too close to the track but that a person might ascend it, hand over hand, with safety. A non-suit was ordered on circuit and affirmed by the Supreme Court. The non-suit was sustainable and was sustained upon this ground:

"Now in this case the deceased was knocked from the train and killed while he was upon the ladder on the outside of the car when the train was passing this structure, and, it is true, that such an accident could not have happened had the tank not been located as it was. But whether the danger of such an accident happening at that point and in that way was of such a character as to have required the company to locate this tank a few inches back, was a material fact in determining whether due care had been exercised, and consequently a material fact on the

question of negligence. In locating this tank, did ordinary or reasonable care or foresight demand that the company should foreknow, or even apprehend, that it was probable, remote or otherwise, that the lantern of a brakeman who was posted on the top of the conductor's cab, and required by the rules of the company to remain there, would go out just as the train was approaching this point, and at the moment that it swept by, that this brakeman, after descending to the cab for a second lantern, would be on the ladder returning to his position?

"It seems to us that these facts, or at least some facts showing the character of care that should have been bestowed, and that it was absent, the danger to be apprehended, and that it was not provided against, or something of that kind, were material facts on the question of negligence before that question could be properly submitted to a jury. But we find no testimony in the record directed to these points. The substance of the entire testimony is, that the tank was close enough to the track to strike one who happened to be on the outside of the car when the train was passing that point; that the deceased was on the outside at this precise moment and was killed; but there was no testimony that in locating this tank so near, the company, in view of such a conjuncture of circumstances, or of any danger resulting therefrom, failed to exercise reasonable care, such care as men ordinarily exercise in the conduct of business. In the absence of such testimony the non-suit was not without authority of law."

If it had appeared in that case that there was reasonable ground for the company to have apprehended that the deceased would make use of the ladder under such extraordinary circumstances, doubtless the non-suit would not have been sustained. The facts in the case at bar parallel the conditions presented in the Davis case. Assuming what I do not think there is a particle of evidence of, that the train stopped, that the switchman mounted the ladder and was knocked off, it is inconceivable that the company could reasonably have apprehended that the conditions which are claimed to have caused the accident would have existed at that particular time and place. It is not contended that the switchman was using the ladder for the purpose for

which it manifestly was intended, to ascend to the top of the car, but that he was using it for an inspection of the brakes upon a moving train. To hold the company liable it seems to me that the Court must hold that it must have anticipated that the train would stop to repair a defective brake; that after it had been repaired the switchman would mount the ladder, hold on to it and lean over to inspect the repaired brake, and that just at the moment that the particular car would reach the semaphore, the car, alternately swaying from side to side would sway toward the semaphore. It is conceded that for the purpose of ascending the ladder under normal conditions, there was abundant clearance between the track and the semaphore.

In R. Co. v. Thirouin (C. C. A.) 9 Fed. 2d 856, it was claimed that decedent was crushed between the girder of a bridge and a train on which he was riding at night, which had only eleven and one-half inches clearance above the train. Thirouin went back on the train before reaching the bridge to investigate sparks which were flying from the train and it was plaintiff's theory (just as it is plaintiff's theory in the present case) that he was leaning out looking for sparks and was struck by the bridge.

The Court reversing a judgment for the plaintiff said:

"It follows that the clearance was sufficient for the purpose for which it was provided and insufficient and highly dangerous for personal use. Against the dangers of personal use, however, the railroad company was required to afford protection only to those of its servants whose duties called them there. * * * We have not found, nor has our attention been directed to, any testimony in the record showing or intimating that Thirouin's duties required him to go within the clearance, or to the end of the girder, or upon the bridge. It is argued that in searching for the trouble he may have leaned out beyond the car just as it came to the end of the bridge and that he may have leaned so far out that he was struck and swept off the train by the center girder. That may be true, but there is no evidence to prove it. Blood on one end of a girder and a foot at the other end of the same girder and the body on the opposite side of the track against another girder open a

wide field for speculation as to how the accident happened and leave nothing certain except the fact of injury and death."

See also:

Reading Co. v. Boyer, 6 Fed. (2d) 185.
Bennett v. Washington Terminal Co., 2 Fed. (2d) 913.
Atlantic Coast Line R. Co. v. Wimberly, 273 U. S. 673.

The latter case involved the death of a brakeman who went out of the cab along the running board and down on the cow catcher to get off the train while it was slowly moving in the night-time, to throw a switch. He was found dead under the train some distance before reaching the switch. The North Carolina Supreme Court (190 N. C. 440) found ample evidence of liability, but its judgment was reversed by the United States Supreme Court on the authority of the Coogan case and other cases.

The case of R. Co. v. Berkshire 254 U. S. 415, which also was among the cases upon the authority of which the former judgment of this Court in 149 S. C. 89 was reversed by the Supreme Court of the United States, can only be applicable to the case at bar by interpreting it as conclusive of the issues presented for the second time in the present appeal. In that case the deceased engineer, leaning out of the side window of his cab, in the discharge of his duty to see the condition of a hot driving-pin, was struck on the head by the end of the horizontally extended arm of a mail crane and instantly killed. The syllabus of the case is as follows:

"The installation of railway mail cranes so close to the track that the arm of a crane when extended comes as near as 14 inches to the window of an engine cab, thus becoming a source of danger to the engineer while in performance of his duty, is not negligence upon the part of the railroad company as respects its employees, when such placing of the cranes is uniform along the railroad, and done by the direction of the Post Office Department pursuant to a plan it found necessary in handling the mails."

The clearance in the case at bar not deducting anything for the claimed swaying of the car, was 27½ inches, while that in the Berkshire case was only 14.

The Berkshire case was re-affirmed in the case of R. Co. v. Leitch 276 U. S. 429, which also was among the cases upon the authority of which the former judgment of this Court was reversed by the Supreme Court of the United States. In it the clearance of the mail crane was 10 inches.

It is mildly suggested that the fact that both the Berkshire case and the Leitch case involved postal cranes and not semaphores creates a distinction between them and the case at bar. All three involve the same question of the erection and maintenance of structures near the track and it is not perceived whether the structure is a mail crane or a semaphore can make the least possible difference.

As both cases were cited as authority for reversal it appears without doubt that the principles announced were intended to be applied to the case then under consideration.

The case of R. Co. v. Allen, 276 U. S. 165 is pertinent. It involved injury to a yard employe who was struck and injured by a shunted car while between the tracks. One ground of negligence alleged and submitted was that the tracks were so close together that an employe between cars on the two tracks was in danger of being struck. On this question the United States Supreme Court said:

"The rule of law which holds the employer to ordinary care to provide his employees a reasonably safe place in which to work did not impose upon defendant an obligation to adopt or maintain any particular standard for the spacing or construction of its tracks and yards. * * * (Citing cases.) Carriers, like other employers, have much freedom of choice in providing facilities and places for the use of their employees. Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries. * * * (Citing cases.) Having regard to plaintiff's knowledge of the situation, it is clear that the evidence when taken most favorably to him is not sufficient to warrant a finding that defendant failed in any duty owed him in respect of the space between the tracks,

* * * The court erred in submitting that question to the jury."

Upon the issue of assumption of risk the undisputed evidence shows that decedent, Marshall, was an experienced railroad man and had worked in the Charleston yards as a switchman three weeks at the time he was killed and for about three months before that time at the same place, and had also worked for appellant as switchman for about two years at Florence. Decedent, while working as a switchman, necessarily went out past these semaphor-s. There was testimony that all freight cars running at a speed of 20 to 25 miles an hour sway from side to side from ten to twenty inches, and further testimony that all railroad men know that freight cars sway from side to side in that way, and also know about semaphores being along the side of the track. Rule No. 706 of the Railroad Company, which was in force at the time decedent was killed, requires all employees to inform themselves respecting "the location of all structures or obstructions along the line which will not clear them when on the top or sides of cars."

In reversing the judgment of this Court and ordering a new trial, the United States Supreme Court cited as one reason for its reversal, the case of C. & O. R. Co. v. Leitch, 276 U. S. page 429. This case, as heretofore pointed out, was a mail crane case and was decided both on the ground of assumed risk, as well as lack of negligence. The facts on the question of assumed risk are not materially different on the present appeal from the facts on the last appeal, and the decision of the United States Supreme Court in reversing the judgment on the prior trial, on the authority of the Leitch case is conclusive on the present appeal that the decedent assumed the risk of injury, as a matter of law. We again quote from the decision in the Leitch case:

"Of course it is answered that these general considerations should not exonerate the railroads from using such care as they can within the conditions. But it seems to be unjust to let the risk of a danger that in any event is imminent vary upon disputed evidence that the danger was brought an inch or two nearer than it would have been if a blue print adopted for the whole line had been fol-

lowed with a more precisely mathematical accuracy. In the Berkshire case the testimony for the plaintiff left a distance of fourteen inches from the end of the crane to the car. Here the plaintiff's witness makes it ten.

The witnesses for the petitioner with greater plausibility make is appreciably more. If there is to be a standard in these cases, and if, as decided, the general rule is that the engineer takes the risk, the railroad should not be made liable for this class of injury except where some unquestionable disregard of obvious precautions is shown."

The Berkshire case also was decided upon the issue of assumption of risk and like the Leitch case manifestly was intended to control the decision of the case.

For these reasons I think that the judgment should be reversed and the case remanded for the entry of judgment for the defendant under Rule 27.

THE STATE OF SOUTH CAROLINA:

IN THE SUPREME COURT

J. L. POWE, as Administrator of George A. Marshall, Deceased, Respondent,

VS.

ATLANTIC COAST LINE RAILROAD COMPANY, Appellant

PRÆCIPE

To the clerk of the above-entitled Court:

You are hereby requested to make a transcript of the record of this cause to be used in an application to the Supreme Court of the United States for a Writ of Certiorari in said cause, the transcript to consist of:

1. The record on appeal in said cause:
2. The opinion of the Supreme Court of the State of South Carolina;
3. All journal entries contained in the records and proceedings of the Supreme Court of the State of South Carolina relating to said cause;

4. The final judgment and decision of the Supreme Court of the State of South Carolina;

5. Your certificate to the record that it is a complete record in said cause.

Dated this 10th day of November, 1930.

Hagood, Rivers & Young, Attorneys for Appellant, Atlantic Coast Line Railroad Company.

IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

J. L. POWE, as Administrator of George A. Marshall, Deceased, Respondent,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, Appellant

CLERK'S CERTIFICATE OF RECORD

I, J. B. Westbrook, Clerk of the Supreme Court of the State of South Carolina, do hereby certify that the foregoing, consisting of one hundred and four (104) numbered pages, is a true and correct transcript of the record on appeal to this Court, comprising the record on appeal from the Court of Common Pleas in and for Charleston County, South Carolina, to this Court, petition for stay of execution and enforcement of final judgment, order staying execution and enforcement of final judgment, bond, the opinion and final judgment of this Court on said appeal and præcipe for preparation of said record.

In witness whereof I have hereunto set my hand and affixed the seal of the Court, this eleventh day of November, nineteen hundred and thirty.

J. B. Westbrook, Clerk the Supreme Court of the State of South Carolina. (Seal Supreme Court of South Carolina.)

[fol. 106] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 19, 1931

The petition herein for a writ of certiorari to the Supreme Court of the State of South Carolina is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,522. South Carolina Supreme Court. Term No. 600. Atlantic Coast Line Railroad Company, petitioner, vs. J. L. Powe, as administrator of George A. Marshall, deceased. Petition for a writ of certiorari and exhibit thereto. Filed December 16, 1930. File No. 35,522.

FILE COPY

Office Supreme Court.
FILED
DEC. 16 19
CHARLES ELMORE CR
CL

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 600

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

vs.

J. L. POWE, ADMINISTRATOR OF GEORGE A. MARSHALL,
DECEASED, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

THOMAS W. DAVIS,
Wilmington, N. C.
ARTHUR R. YOUNG,
Charleston, S. C.
V. E. PHELPS,
Wilmington, N. C.

(35,522)

INDEX TO PETITION FOR WRIT OF CERTIORARI.

	Page
Petition for writ of certiorari:	
1. Matters involved and reasons relied on by petitioner for allowance of writ	2
2. Summary of reasons for allowance of writ	11
Prayer for writ	13

Table of Cases Cited.

Atlantic Coast Line R. Co. v. Tyner, 278 U. S., 565	12
Chesapeake & O. R. Co. vs. Leitch, 278 U. S., 429	2, 12
Chicago, M. & St. P. R. Co. vs. Coogan, 271 U. S., 472	2, 12
Glenn vs. Sumner, 132 U. S., 152	12
Gulf, C. & S. F. R. Co. vs. Moser, 275 U. S., 133	2
McCully vs. Monongahela Ry. Co., 289 Pa., 393; 137 Atl., 623; certiorari denied in 275 U. S., 542	12
Norfolk Southern R. Co. vs. Ferebee, 238 U. S., 269	12
Southern P. Co. vs. Berkshire, 254 U. S., 415	2, 12
Toledo, St. L. and W. R. Co. vs. Allen, 276 U. S., 135	11

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930

No. 600

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

vs.

J. L. POWE, ADMINISTRATOR OF GEORGE A. MARSHALL,
DECEASED, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner, Atlantic Coast Line Railroad Company, respectfully asks this Court to review on writ of *certiorari* a judgment of the Supreme Court of the State of South Carolina in the case of *J. L. Powe, as administrator of George A. Marshall, deceased, versus Atlantic Coast Line Railroad Company,* rendered on the 19th day of September, 1930, as shown by a true

copy of the record therein, herein filed (R. 81). Under the practice prevailing in South Carolina, no final judgment, separate from the opinion of the Supreme Court, is rendered, and the opinion is the final judgment. See clerk's certificate (R. 114).

This case has heretofore been before this Court on petition for *certiorari* under the style of *Atlantic Coast Line Railroad Company, petitioner, versus C. M. Tyner, as administrator of George A. Marshall, deceased* (No. 747, October term, 1927), in which petition for *certiorari* was granted (276 U. S. 613), and after final argument and hearing the judgment for respondent Tyner was reversed and the cause remanded (278 U. S. 656) in a *per curiam* decision rendered on October 29, 1928, reading as follows:

> "Reversed and remanded for a new trial on the authority of (1) *Chicago, M. & St. P. R. Co. vs. Coogan*, 271 U. S. 472; (2) *Southern P. Co. vs. Berkshire*, 254 U. S. 415; *Chesapeake & O. R. Co. vs. Leitch*, 276 U. S. 429; (3) *Gulf, C. & S. F. R. Co. vs. Moser*, 275 U. S. 133."

The respondent administrator, C. M. Tyner, died and on September 19, 1929, J. L. Powe, who had been appointed administrator of George A. Marshall, deceased, was substituted as plaintiff in the cause (R. 1).

The matters involved and the reasons relied on by petitioner for the allowance of the writ are:

I.

This action was brought, tried and decided under the Federal Employers' Liability Act, and it was also

alleged in the complaint and admitted in the answer that both intestate and the Railroad Company were engaged in interstate commerce at the time of the injury (R. 1, 3, 7). The action was brought to recover for the alleged negligent death of respondent's intestate, George A. Marshall, who was employed by petitioner as a switchman in the yard at Charleston, South Carolina, and was found dead in the early morning of January 6, 1923, the body lying about twenty or twenty-five feet south of Semaphore No. 3911, which is on the west side of petitioner's main-line track, between Charleston and Bennetts Yard (R. 11, 23, 24). The theory of liability alleged in the complaint was that decedent was riding on some cars on petitioner's main-line track at or near Charleston, South Carolina, going in the direction of that city, at about three o'clock in the morning, and the cars were stopped by reason of trouble with some of the brakes, causing Marshall to get down to correct the trouble, and that while he was mounting the ladder attached to one of the cars, after they started again, or while he was examining the defective car, the defects in which were due to petitioner's negligence, he was struck by a semaphore or signal device which petitioner had negligently caused to be placed too close to the track, so as to leave an insufficient space between it and the side of the train (R. 4, 5).

The evidence given at the first trial of this cause, in which the judgment was rendered which was reversed by this Court, was much fuller and more detailed on material points than the testimony given at the second trial, since none of the trainmen on the train on which

he was alleged to have been riding shortly before his death testified on the second trial. Accordingly, *there is no testimony in this record by anyone that decedent was on the side of any car of petitioner, or even that a train passed the semaphore that night, near which decedent was found dead.* Apparently, respondent seeks to supply the lack of such testimony by reliance on alleged admissions claimed to be contained in petitioner's plea of contributory negligence, hereinafter set out, which was admitted in evidence by the trial court over objection, and such admission sustained by the State Supreme Court. Except two orders of the Railroad Commission of South Carolina, which were introduced by petitioner, all the evidence in the case was offered by respondent. The testimony of an exhumation of decedent's body, made six years after his death, showed that his skull in the back of the head was crushed in (R. 29, 49), which must have been caused by a terrific blow in that part of his skull, and could not, according to the opinion of the medical witness, be caused by falling from the train on the ground (R. 31), but was caused by coming in contact, with force, with a hard object. Decedent was instantly killed, but might not have relaxed immediately (R. 34, 35). The only evidence as to the finding of the body is that of the coroner, Mansfield (R. 23), who arrived at the scene of the accident about 3:30 a. m. (R. 24). When the coroner arrived, there were a number of people standing around the scene of the accident where decedent's body was found, which was 20 to 25 feet south of semaphore 3911 (R. 24). The coroner found the dew brushed off of the *east* side of the semaphore about

4 or 5 feet from the ground (R. 24, 25). Decedent's brother-in-law, C. G. Tyner, who did not testify at the first trial and who got to the scene of the accident about noon the next day, or nine or ten hours after the body was discovered by others, testified (R. 49, 51) that about four feet from the base of the semaphore he found that something had wiped the smoke and soot off, and about six or seven inches farther there were, apparently, blood stains on the north side of the semaphore casing.

The evidence for respondent shows that from the base of semaphore No. 3911, twenty or twenty-five feet *south* of which decedent's body was found, to the nearest outside rail of petitioner's track, the distance was *four feet ten inches*, and from the base of this semaphore post to the outside cross-tie three feet and two inches, and from the outside rail to the top of the base of the signal post four feet nine inches (R. 14, 15, 17). A civil engineer testified for respondent that he measured the distance from the rail of four semaphores, No. 3911, No. 3901, No. 3906, and No. 3916; that from the base of 3911 to the outer edge of the west rail of petitioner's track the distance was four feet five and one-quarter inches, and from a point about three feet above the ground it was *four feet seven and one-half inches* from the rail (R. 21); that the distance from the base of semaphore 3906, just south of the preceding one, to the west rail was five feet nine inches, and the similar distance from the base of 3901 was seven feet six and one-half inches, and that the distance from the west rail to the base of semaphore 3916 was six feet seven and three-quarters inches (R. 18, 19). Sema-

phore 3911 is on a straight track, and some of the others are on a curve (R. 20). These distances would be the same up to about six feet four inches of the semaphore, when they would become somewhat greater, around six inches difference (R. 21). This witness did not know the location of these semaphores and of the track in 1923, when decedent was killed, and did not measure any other semaphores, as he was only asked to measure these particular semaphores (R. 21). These semaphores are placed along the road as safety devices for the operation of trains (R. 22).

The orders of the South Carolina Railroad Commission adopted in 1916, as amended, which were enacted for the safety of the public "and employees of the railroad" (R. 55, 56), provided "that no obstruction be allowed erected or maintained at any point other than station grounds *nearer than four feet* from the outer edge of the main or side track rail of any railroad in the State of South Carolina, *measurements being made four feet above the top of rail.*"

The seventh allegation of petitioner's answer, setting up the defense of contributory negligence (R. 54), was admitted in evidence over petitioner's objection, and reads:

> "Seventh. Further answering said complaint, and for a further defense to said action, this defendant alleges that the injuries and death of the deceased were due to and caused by the negligence of the said deceased contributing to and combining and concurring with the alleged negligence of the defendant and constituting a proximate cause thereof, without which the same

would not have happened, in the following particulars, to wit:

"(*a*) In not going directly to the roof of the freight car on which he was riding *as instructed by the conductor of said train,* but in remaining on the side of the car, *contrary to said orders and instructions.*

"(*b*) In not keeping a proper lookout for the signal devices and other obstructions which are ordinarily erected on the side of tracks of the defendant, near said tracks.

"(*c*) In failing and omitting to keep a proper lookout for the semaphore mentioned in the complaint herein, *whose presence and location were well known to the deceased.*

"(*d*) In leaning outward from the ladder of said freight car so as to bring his body in contact with the said semaphore erected at a greater distance from the track than is required by the regulations of the South Carolina Railroad Commission, hereinbefore set forth." (Italics ours.)

In explanation of his admission of this part of petitioner's answer as evidence, the trial court charged the jury (R. 73) as follows:

"Now that brings up the same question again, I think, and I charge you that *the statements of fact set out in paragraph seven you may consider.* As to any admission whatsoever of negligence against the Atlantic Coast Line Railroad Company, you can't consider. It is only those statements of fact set out in paragraph seven which facts they allege constitute contributory negligence. As I say, *contributory negligence*

goes out of the case, but the facts set out there and upon which they sought to base their charge of contributory negligence you may consider. The rest of it you can't consider at all." (Italics ours.)

Petitioner's answer, after admitting certain facts in its first paragraph, in the second paragraph thereof denied "each and every other allegation in said complaint, not hereinabove or hereinafter specifically admitted." The answer did not elsewhere admit that decedent was on the side of a car, or on a car, when struck by a semaphore (if he was), unless the plea of contributory negligence above set out can be properly held to admit, for evidential purposes, that fact. The State Supreme Court upheld the admission in evidence of this part of petitioner's answer. If this part of the answer were admissible at all, the facts stated therein were wholly undisputed and showed that decedent rode on the side of the car contrary to the *conductor's orders,* and also showed that he well knew of the "presence and location" of the semaphore, but the State courts did not give any legal effect to these undisputed facts in deciding either the question of assumed risk or whether there was actionable negligence.

A witness formerly employed as a railroad trainman, but who did not even profess to have seen the accident, making the assumption that the body was found twenty to twenty-five feet south of the semaphore, testified that the speed of the train from which decedent was thrown (if he was) must have been between twenty-five and thirty miles an hour, attempting to qualify himself to give this opinion by stating that he

had seen packages and sacks thrown from moving trains (R. 38, 39). This is the only testimony in the record as to the speed of any train on which decedent was alleged in the complaint to have been. Respondent produced no witness to testify (*a*) that decedent was on any train when killed, (*b*) the time when decedent was killed, or (*c*) where he was when killed. Several witnesses testified for respondent that when freight trains were running at a speed of twenty to twenty-five or thirty miles an hour they sway from side to side from ten to twenty inches, the sway beginning about a little midway the car (R. 39, 44, 50), and there was also testimony that the whole car swayed down to the truck. Respondent's testimony also showed that decedent, while working as a switchman, necessarily went out past this semaphore (R. 40, 41), and all railroad men know that freight cars sway from side to side in that way, and also know about semaphores being along the side of the track (R. 40, 41, 42, 45, 46, 47, 53). Petitioner's Rule No. 706, which was in force in 1923, when respondent was killed, provides:

> "Employees are required to inform themselves respecting the location of all structures or obstructions along the line which will not clear them *when on the top or sides of cars*" (R. 53). (Italics ours.)

Decedent, Marshall, was an experienced railroad man and had worked in the Charleston Yard as a switchman three weeks at the time he was killed, and for about three months before that time at the same place

(R. 12), and had also worked for appellant as switchman for about two years, at Florence, South Carolina (R. 13). There was general testimony by a former trainman of petitioner, who did not see the accident, that it was a switchman's duty to watch the brakes and find out when anything got out of order, and to do so he would have to ride where his duties called him, and also that box cars are equipped with side and end ladders for employees to use in going up and down (R. 39, 40). In sustaining the trial court in refusing to direct a verdict for defendant, petitioner here, on the ground that no actionable negligence had been proven on its part, the Supreme Court of South Carolina says:

> "A careful analysis of the evidence is convincing that this exception cannot be sustained. It was shown that the base of the semaphore was four feet ten inches (4′ 10″) from the track, only ten (10) inches more than the minimum allowed by the Railroad Commission; that when the train was running twenty or twenty-five miles an hour the car swayed from eight (8) to twenty (20) inches. *Under the testimony the car projected beyond the track a distance of two feet four inches (2′ 4″) with the ladder two and one-half (2½) inches, more, making a total projection of two feet six and one-half inches (2′ 6½″); that when the car was at rest the clearance between the semaphores and the ladder was two feet three and one-half inches (2′ 3½″); that the clearance when the car was moving at a rate of twenty (20) or twenty-five (25) miles per hour would be from one foot seven and one-half inches (1′ 7½″) to seven and one-half (7½″)*

inches. Taking into consideration the swaying, of course, and the thickness of a man's body, the jury could have well concluded that the semaphore was placed within an unsafe distance of a moving train."

There is absolutely no evidence in the record to sustain the facts set forth above in italics, or any statement in the record of the distances mentioned by the South Carolina Supreme Court. The said court, therefore, must have considered in evidence in this case facts which were in evidence upon the first trial alone and which were not produced upon this one.

Judgment was rendered for respondent in the sum of $30,000.00 (R. 2), which judgment was affirmed by the Supreme Court of South Carolina on September 19, 1930, as shown by its opinion and judgment in the record, Cothran, J., dissenting, however (R. 81).

II.

Your petitioner earnestly contends that writ of *certiorari* should be granted by this court to review and reverse the judgment of the State Supreme Court herein because:

(1) The undisputed evidence herein is wholly insufficient to prove actionable negligence by petitioner (R. 73). The opinion of the State Supreme Court indicates that it, apparently, considered, in deciding this question, some facts which were in evidence on the first trial *but were not put in evidence on the second trial and not in this record.*

Toledo, St. L. and W. R. Co. vs. Allen, 276 U. S. 165.

Chesapeake & Ohio R. Co. vs. Leitch, 276 U. S. 429.

McCully vs. Monongahela Ry. Co., 289 Pa. 393, 137 Atl., 623, certiorari denied in 275 U. S. 542.

(2) The evidence herein is wholly insufficient to show the proximate cause of decedent's death and leaves that question entirely to conjecture (R. 74).

Chicago, M. & St. P. R. Co. vs. Coogan, 271 U. S. 472.

Atlantic Coast Line R. Co. vs. Tyner, 278 U. S. 565.

(*a*) The State courts erred in arbitrarily admitting in evidence petitioner's plea of contributory negligence, and in giving it effect as evidence (R. 71).

Glenn vs. Sumner, 132 U. S. 152.

Norfolk Southern R. Co. vs. Ferebee, 238 U. S. 269.

(3) Under the undisputed evidence decedent assumed, as a matter of law, the risk of injury from coming in contact with the semaphore in question (R. 73). Aside from other sufficient evidence in the record, the facts stated in the seventh paragraph of petitioner's answer, if admissible in evidence, showed that decedent well knew of the "presence and location" of the semaphore and, of themselves, showed assumption of risk.

Atlantic Coast Line R. Co. vs. Tyner, 278 U. S. 565.

Southern Pac. Co. vs. Berkshire, 254 U. S. 415.

Chesapeake & O. R. Co. vs. Leitch, 276 U. S. 429.

WHEREFORE, because said decision and judgment of the State Supreme Court decided the foregoing Federal questions in a way not in accord with the applicable decisions of this court, your petitioner prays that a writ of *certiorari* be issued to the Supreme Court of the State of South Carolina, to the end that said cause may be reviewed and determined by this Court, as provided by law, and that upon such review the said judgment of the Supreme Court of South Carolina, be ordered to be reversed.

ATLANTIC COAST LINE RAILROAD COMPANY,

By THOMAS W. DAVIS,
ARTHUR R. YOUNG,
V. E. PHELPS,

Attorneys for Petitioner, Atlantic Coast Line Railroad Company.

INDEX TO BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

	Page
Brief in support of petition:	
Official report	1
Statement of grounds of jurisdiction	1
Statement of case	3
Argument and propositions:	
I. The undisputed evidence is wholly insufficient to prove actionable negligence by petitioner in placing its semaphore	3
II. The evidence is wholly insufficient to show the cause of decedent's death, and leaves that question entirely to conjecture	17
(a) The State courts erred in arbitrarily admitting in evidence petitioner's plea of contributory negligence, and in giving it effect as evidence	21
III. Under the evidence decedent assumed, as a matter of law, any risk of injury from the position of the semaphore	27
Conclusion	22

TABLE OF CASES CITED.

Atlantic Coast Line R. Co. vs. Tyner, 278 U. S., 565.. 2, 8, 17, 27, 29
Beckett vs. Stuart, 40 Cal. App., 108; 180 Pac., 348..... 6
Blake vs. Southern Ry. Co., 126 S. C., 407..... 23
Brock vs. Nelson, 29 S. C., 49 (52)..... 25
Carrier vs. Hague, 9 Rich., 454, 459 (S. C.)..... 14, 31
Central of Georgia R. R. vs. Davis, 7 Fed. (2d), 269..... 16
Charping vs. Toxaway Mills, 70 S. C., 470..... 25
Chesapeake & O. Ry. Co. vs. Leitch, 276 U. S., 429... 2, 8, 16, 27, 28, 29
Chicago, M. & St. P. R. Co. vs. Coogan, 271 U. S., 472..... 2, 14, 16, 17, 20, 21
Cohen vs Robert, 2 Strobhart, 410-416 (S. C.)..... 14, 31
Frese vs. C., B. & Q. R. Co., 263 U. S., 1..... 15
Gilbreath vs. Furman, 57 S. C., 289 (293)..... 25
Glenn vs. Sumner, 132 U. S., 152..... 26

Page

Gulf, M. & N. R. Co. vs. Wells, 275 U. S., 455 7
Gunning vs. Cooley, 281 U. S., 90 ..... 14, 16, 31
Hickson vs. Early, 60 S. C., 42 (51) 26
McCully vs. Monongahela Ry. Co., 289 Pa., 393; certiorari denied in 275 U. S., 542 ..... 2, 11, 29
McJimpsey vs. So. Ry., 89 S. C., 122 23
Milas vs. United States Oil Co., 264 S. W., 761-763 (Ky.) 6
New York Central R. Co. vs. Ambrose, 280 U. S., 486, 491 15
Norfolk So. R. Co. vs. Ferebee, 230 U. S., 269 21
Philadelphia & R. Ry. Co. vs. Thirouin, 9 Fed. (2d), 856 (Third Circuit) 13, 20
Smith vs. Gale, 144 U. S., 509, 524 ..... 26, 27
So. Pac. Co. vs. Berkshire, 254 U. S., 415 ..... 2, 8, 12, 27, 28, 29
Southern Ry. Co. vs. King, 271 U. S. (524) 15
Spriggs vs. Jamerson, 115 Va., 250; 78 S. E., 571 6
Stanley vs. Schoolbred, 25 S. C., 181 (191) 23
Toledo, St. L. & W. R. Co. vs. Allen, 276 U. S., 165 ..... 2, 10

STATUTES CITED.

Federal Employers' Liability Act of 1908, Act Cong. approved April 22, 1908, as amended 1, 2
Judicial Code, Section 237, as amended by Act Cong. September 6, 1916, Chap. 448, Sec. 2, and Act Cong. February 13, 1925, Chap. 229, Section 1 2

OTHER AUTHORITIES CITED.

4 Corpus Juris, title, "Appeal and Error," page 647, Sec. 2572 .. 6
22 Corpus Juris, title, "Evidence," Sec. 490 14
49 Corpus Juris, Sec. 358 22
22 Corpus Juris, title, "Evidence," Sec. 449 30

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 600

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

vs.

J. L. POWE, ADMINISTRATOR OF GEORGE A. MARSHALL,
DECEASED, RESPONDENT.

BRIEF FOR PETITIONER.

Official Report.

The decision of the Supreme Court of South Carolina has not yet been officially reported. It is found on page 81 of the record.

Statement of Grounds of Jurisdiction.

The date of the judgment sought to be reviewed herein is September 19, 1930.

This action was brought, tried and decided by the State courts under the Federal Employers' Liability Act of 1908 (R. 3, 4, 7 and opinion of State Supreme

Court, page 81 of record). The present judgment was rendered on the second trial of this case, after this Court (*Atlantic Coast Line Railroad Company vs. Tyner,* 278 U. S. 565) had reversed and remanded for new trial a former judgment for respondent in the sum of twenty-eight thousand eight hundred ($28,800.00) dollars. On the second trial judgment was rendered for respondent for thirty thousand ($30,000.00) dollars (R. 2), and petitioner appealed to the State Supreme Court. The judgment was affirmed by the South Carolina Supreme Court (R. 81), Cothran, J., dissenting.

The jurisdiction of this Court is invoked under the Federal Employers' Liability Act of 1908, Act. Congress approved April 22, 1908, as amended, and under Judicial Code, Section 237, as amended by Act Congress September 6, 1916, Chapter 448, Section 2, and Act Congress February 13, 1925, Chapter 229, Section 1.

The cases believed to sustain the jurisdiction of this court are:

Atlantic Coast Line Railroad Co. vs. Tyner, 278 U. S. 565.

Southern Pacific Ry. Co. vs. Berkshire, 254 U. S. 415.

Chesapeake & O. Ry. Co. vs. Leitch, 276 U. S. 429.

Chicago, M. & St. P. R. Co. vs. Coogan, 271 U. S. 472.

Toledo, St. L. & W. R. Co. vs. Allen, 276 U. S. 165.

McCully vs. Monongahela Ry. Co., 289 Pa. 393, certiorari denied in 275 U. S. 542.

Statement of Case

All of the relevant facts are fully set out in the petition, and will be stated in the body of this brief in so far as may be necessary to a discussion of the several questions involved; repetition here will, therefore, be unnecessary.

Point I.

The undisputed evidence herein is wholly insufficient to prove actionable negligence by petitioner in placing its semaphore.

This question is raised by petitioner's third exception (R. 73).

In discussing this question it will be assumed (which the testimony does not at all show) that decedent may have been on a train passing this semaphore when he was killed and near which his body was found. The facts developed at the second trial with respect to the distance the semaphore was from the railroad track are not materially different from those in evidence at the first trial, though other facts bearing on the question of negligence, as alleged in the complaint, which were in evidence on the first trial, were not put in the evidence at the second trial and are not found in the present record. The negligence alleged in the complaint, is in substance (R. 4, 5), that decedent was riding on some cars on the main line track at or near Charleston, about three o'clock A. M., and the train was stopped by reason of some trouble with some of

the brakes on the cars, causing decedent Marshall to get down to correct the trouble, and that after the cars had started again and either while he was mounting the ladder attached to one of the cars, or while he was examining the defective car, the defects in which were due to petitioner's negligence, thereby necessitating decedent examining the same, he was struck by a semaphore or signal device which petitioner had negligently caused to be placed too close to the track, so as to leave an insufficient space between it and the side of the train (R. 4, 5, 6). There is no testimony whatever in the present record that decedent was examining a car, or that there were any defects in the brakes of a train he was on, and no evidence whatever to show that his duties at the time required him to be on any train of petitioner, on the side of a car, or elsewhere; and there is, likewise, no evidence that decedent was even on any train of petitioner the night he was killed, unless the seventh paragraph of petitioner's answer, set out in the petition herein, is competent evidence of that fact. Admittedly, decedent's body was found 20 to 25 feet south of semaphore No. 3911. One of respondent's witnesses testified that the distance from the base of semaphore 3911 to the nearest (west) outside rail of the track was 4 feet 10 inches (R. 17). This was the distance taken in the opinion of the State Supreme Court. This witness further testified that the distance from the base of this semaphore to the outside cross tie was 3 feet 2 inches, and from the outside rail to the top of the base of the semaphore 4 feet 9 inches (R. 14, 15, 17). Another witness for

respondent, who made his measurements about six years after the accident, testified that he measured the distance from the rail to four of petitioner's semaphores, Nos. 3911, 3901, 3906 and 3916. That from the base of 3911 to the outer edge of the west rail of the track the distance was 4 feet 5¼ inches, and from a point 3 feet above the ground it was 4 feet 7½ inches (R. 21) from the rail; that the distance from the base of semaphore 3906, just south of the preceding one to the same west rail, was 5 feet 6½ inches, and that the distance from the west rail to the base of semaphore 3916 was 6 feet 7¾ inches (R. 18, 19).

In analyzing the evidence on the question of negligence, the Supreme Court of South Carolina says in its opinion (R. 90):

> "Under the testimony the car projected beyond the track a distance of two feet four inches (2′ 4″) with the ladder two and one-half (2½) inches more, making a total projection of two feet six and one-half inches (2′ 6½″); that when the car was at rest the clearance between the semaphore and the ladder was two feet three and one-half inches (2′ 3½″); that the clearance when the car was moving at a rate of twenty (20) or twenty-five (25) miles per hour would be from one foot seven and one-half (1′ 7½″) to seven and one-half (7½″) inches."

There is not a scintilla of evidence in the record to sustain this statement, or any statement, of the distances mentioned by the State Supreme Court. That Court is wholly in error in supposing that there is any such evidence in the record. There is no evidence

showing, either directly or by any possible inference, the distance between the side of a car and the semaphore in question or how far a car projects from the rail, when standing still or in motion. Some of these facts were in the record of testimony *taken on the first trial,* or were inferable therefrom, *i. e.*, that the distance between the rails was 4 feet 7½ inches, the width of a box car 9 feet 3½ inches, and that the side ladder projected 2½ inches therefrom, and the State Supreme Court, in its opinion on the first appeal to it (*Tyner, Admr. vs. Atlantic Coast Line Railroad Company*), 149 S. C. 89, 146 S. E. at page 671, in which its judgment was reversed by this court for a new trial, referred to the facts above set out. It would seem, therefore, that the State Supreme Court, on this second appeal, considered facts in evidence on the *first trial,* which were not in evidence or before the jury on the second trial, and the vice of this course is noted by Cothran, J., in his dissenting opinion herein (R. 97). But, clearly, facts not in evidence on the second trial or before the jury, cannot properly be considered by the appellate court.

4 Corpus Juris, title "Appeal and Error", page 647, Sec. 2572.

Spriggs vs. Jamerson, 115 Va. 250, 78 S. E. 571.

Milas vs. United Oil Co., 264 S. W. 761-763 (Ky.).

Beckett vs. Stuart, 40 Cal. App. 108, 180 Pac. 348.

The only additional evidence in the present record to that above set out in this brief, at all bearing on the

question of negligence, is testimony of several witnesses that when freight trains run at a speed of from twenty to thirty miles an hour they sway from side to side from ten to twenty inches (R. 39, 44, 50), but the only testimony as to the speed of any train on which decedent was supposed to have been when passing the semaphore, was given by a witness who did not pretend to have seen the accident, but was permitted to testify that, assuming decedent's body was found twenty to twenty-five feet south of the semaphore, the speed of the train from which decedent was thrown was between twenty-five and thirty miles an hour; and the *sole qualification* of the witness who was permitted, over objection, to give this opinion as to the speed of the train, was that he had seen *packages and mail sacks thrown from moving trains* (R. 38, 39). We submit that this opinion testimony, or rather arbitrary guess, as to the speed of the train on which decedent was supposed to have been riding, does not rise to the dignity of evidence and is incompetent, and cannot be deemed that kind of substantial testimony which will impose liability under the Federal Act.

In the case of *Gulf, M. & N. R. Co. vs. Wells*, 275 U. S. 455, this court refused to give any material weight to testimony of a brakeman, injured by falling while boarding a moving train, that the engine gave an unusual jerk at the time he attempted to board, stating that such testimony was obviously a mere conjecture, since the trainman was then at the side of caboose where he could not see what occurred on the engine. As there is no proper testimony as to the

speed of any train that decedent may have been on when he passed the semaphore (if he did), the testimony as to the sway of the car at that speed must also go out of the case, leaving the only substantial testimony in the case to the effect that the base of semaphore 3911 was 4 feet 10 inches from the nearest outside rail of the track, or, as stated by another witness, 4 feet 7½ inches (R. 14, 20, 21). Do these few facts make out a case of negligence in placing the semaphore, under the applicable authorities?

We submit the decision in this case is ruled by, and must be decided under, the former decision of this court in *Atlantic Coast Line Railroad Company vs. Tyner*, 278 U. S. 565, reversing the former judgment for respondent and remanding the case for a new trial. In its *per curiam* opinion of reversal this court cited, among others, the following cases:

Southern Pac. Ry. Co. vs. Berkshire, 254 U. S. 415.

Chesapeake & O. R. Co. vs. Leitch, 276 U. S. 429.

Both of these cases involved injury to trainmen by coming in contact with mail cranes along the track. Respondent's counsel, as well as the State Supreme Court, take the position that these cases are limited in their application to cases involving mail cranes, which are erected under regulations of the post office department and are required to be placed very close to the track; but, obviously, this distinction is not sound, since this court would not have cited these cases in its opinion in the *Tyner* case in reversing the judg-

men, unless it deemed them applicable to this case, *which is not a mail crane case.* Furthermore, the opinion in the *Leitch* case, which deals with the question of negligence, as well as assumed risk, clearly shows on its face that its principle is not limited to mail cranes. In the *Leitch* case the court said:

> "*The grounds of that decision were that it is impracticable to require railroads to have no structures so near to their tracks as to endanger persons who lean from the windows of the cars;* that they are obliged to erect mail cranes near enough to the tracks for the train to pick up mail sacks without stopping; that it is almost if not quite impossible to set the cranes so far away as to leave no danger to one leaning out, and that in dealing with a well known incident of the employment, adopted in the interest of the public, it is unreasonable to throw the risk of it upon those who were compelled to adopt it.
>
> "Of course it is answered that these general considerations should not exonerate the railroads from using such care as they can within the conditions. *But it seems to us unjust to let the risk of a danger that in any event is imminent vary upon disputed evidence that the danger was brought an inch or two nearer than it would have been if a blue print adopted for the whole line had been followed with a more precisely mathematical accuracy.*

In the Berkshire case the testimony for the plaintiff left a distance of fourteen inches from the end of the crane to the car. Here the plaintiff's witness makes it *ten.* The witnesses for the petitioner with greater plausibility make it

> appreciably more. If there is to be a standard in these cases, and if, as decided, the general rule is that the engineer takes the risk, the railroad should not be made liable for this class of injury except where some unquestionable disregard of obvious precautions is shown." (Italics ours).

The general principle enunciated by the decisions of this court with respect to liability of a railroad company on account of injury to trainmen from coming in contact with permanent structures along the track, is that the location of such facilities is primarily a matter for the exercise of the judgment and discretion of the carrier, and it should not be made liable for this class of injuries, as stated in the *Leitch* case, "except where some unquestionable disregard of obvious precautions is shown". The case of *Toledo, St. L. & W. R. Co. vs. Allen*, 276 U. S. 165, involved the application of the same principle and on page 180 the court said:

> "The rule of law which holds the employer to ordinary care to provide his employes a reasonably safe place in which to work did not impose upon defendant an obligation to adopt or maintain any particular standard for the spacing or construction of its tracks and yards. *Baltimore & O. R. Co. v. Croeger*, 266 U. S. 521, 529, 69 L. Ed. 419, 424, 45 Sup. Ct. Rep. 169, Carriers, like other employers, have much freedom of choice in providing facilities and places for the use of their employes. *Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and vary-*

> *ing opinions of juries. Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S. 189, 194, 30 L. Ed. 1114, 1116, 7 Sup. Ct. Rep. 1166; *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 482, 27 L. Ed. 1003, 1005, 3 Sup. Ct. Rep. 322. *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 570, 34 L. Ed. 235, 241, 10 Sup. Ct. Rep. 1044. Having regard to plaintiff's knowledge of the situation, it is clear that the evidence when taken most favorably to him is not sufficient to warrant a finding that defendant failed in any duty owed him in respect of the space between the tracks. *Missouri P. R. Co. v. Aeby, supra.* The court erred in submitting that question to the jury." (Italics ours.)

The clearance between cars on the tracks involved in that case was "only about 2 feet 9 inches, without considering the grab irons * * * projecting 4½ inches from each corner" of the cars.

The case of *McCully vs. Monongahela Ry. Co.* 289 Pa. 393, *certiorari* denied in 275 U. S. 542, is so closely in point both in principle and on the facts, as to justify a quotation from the opinion of the State Supreme Court. That case involved injury to a locomotive fireman, by coming in contact with the upright supports of a coal tipple built over the track, while leaning out of the cab. There was only a clearance of *18 inches* between the upright and the cab. The State Supreme Court said:

> "To hold a railroad liable in damages for improper construction of its appliances or structures it is necessary to convict it of negligence. *It must appear that the appliance or*

structure was closer to the rolling stock of the railroad when in motion than ordinarily necessary; but close clearance alone is not enough to sustain a charge of negligence.

"Coal tipples used in connection with railroads are an absolute necessity to corporate life, business industry, and the development of our resources. These structures must be located with reference to convenience and economical use, as a necessary part of the physical plant, without interference from those who by nature or study are not qualified to set a standard as to their location. *Ordinarily the placement of such structures is for the determination of railroad officers, who in wise administration of the road select them with a view toward protection to the public and their employees, as well as efficient service.* They must know their duty in the premises, and must be at liberty to exercise the sound discretion the law gives them. The correct disposition of these matters establishes a rule of conduct of a permanent nature affecting the entire system. 'On the common-law principles of tort the adoption of an improvement in the public interest does not throw the risk of all incidental damage upon those who adopted it, however fair it may be to put the expenses of insurance upon those who use it. It is going very far to leave it open to a jury to attach liability in tort to a system. *Southern Pac. Co. v. Berkshire,* 254 U. S. 415, 418, 41 Sup. Ct. Rep. 162, 163 (65 L. Ed. 335). If it did, there would be a constant brake put on the activities of the managing authorities to the discouragement of efficient service.

"Accidents resulting from the close proximity of structures to railroad tracks have been

numerous. The rules of law applicable in such cases have been well stated in *Boyd v. Harris, et al.*, 176 Pa. 484, 488, 35 A. 222. In that case a brakeman employed by defendants was killed by colliding with a cattle chute located near a siding. The court said:

'This case presents a question, the importance of which extends far beyond the present parties and the judgment to be entered herein. It is whether the location of the permanent structures along a line of railroad necessary to accomodate its business is to be determined by the railroad company or by a petit jury. If by the former, they may be located with reference to the convenient and economical use of the railroad and the accomodation of its traffic. If by the latter, these considerations will be lost sight of, and the proper location will be a shifting one to be settled by each successive jury in accordance with its own notions and the peculiar features of the case on trial. One jury may hold a given location to be safe and proper. The next jury may hold it to be unsafe and therefore improper.'

"Where they shall be placed and how they shall be arranged are questions that belong to the railroad company as truly as the location of the switches and sidings or of the track itself." (Italics ours.)

The only questions involved in the *McCully* case, which was decided under the Federal Employers' Liability Act, were those of negligence and assumption of risk.

In the case of *Philadelphia & R. Ry. Co. vs. Thirouin*, 9 Fed. (2d) 856 (Third Circuit), it was held that a

clearance of only *11½ inches* between the top of the car and a bridge girder was not negligence as to a brakeman whose duties did not require him to get in a position which would permit him to be struck by the bridge girder. There is no evidence at all in this record that the duties of decedent, Marshall, at the time he was killed, required him to be on the side of a car or lean out therefrom. The burden was on respondent, of course, to affirmatively prove facts tending to show negligence. *Coogan* case, *supra.* Not only does the evidence fail to show that decedent had any duties to perform on the side of a car when passing semaphore 3911, but, if the seventh paragraph of petitioners' answer was properly admitted in evidence, it showed, without dispute, as a fact, (R. 54) that decedent did not go up to the roof of the freight car "as instructed by the conductor of said train," but remained on the side of the car "contrary to said orders and instructions." The statements of facts in this part of petitioner's answer are wholly undisputed and unaffected by any other evidence in the record, and were offered in evidence by respondent. *If this evidence was admissible, all of it must be considered, including that part which is favorable to petitioner.*

Gunning vs. Cooley, 281 U. S. 90.

22 Corpus Juris, title "Evidence," Section 499.

Cohen vs. Robert, 2 Strobhart, 410, 416 (S. C.).

Carrier vs. Hague, 9 Rich. 454, 459 (S. C.).

If decedent was on the side of a car in direct violation of the orders of his superior, and not in the dis-

charge of any duty there, there would be no actionable negligence as to him, as held in the *Thirouin* case. See also

New York Central R. Co. vs. Ambrose, 280 U. S. U. S. 486, 491.

Furthermore, the undisputed evidence shows that semaphore 3911 was from 7½ to 10 inches farther from the track than is required by the regulations of the South Carolina Railroad Commission. These regulations (R. 55, 56), which were adopted for the "safety of the general public and employees" of the Railroad, prohibited any structure or obstruction from being erected or maintained "*nearer than 4 feet* from the outer edge of the nearest rail," measurement being made four feet above the top of rail. This Court gave effect to State statutes regulating railroads in the cases of

Frese vs. C. B. & Q. R. Co., 263 U. S. 1, and
Southern Ry. Co. vs. King, 217 U. S. 524.

Petitioner submits that if full compliance with the foregoing state regulations as to the distance of structures from the track should not be deemed to conclusively show the exercise of due care, such compliance should at least be *prima facie* evidence of the exercise of due care in placing structures along the track and should be given controlling effect in a case like this one, where the evidence wholly fails to show that an employee on the side of a car, himself in the exercise of due care, would probably be struck by the semaphore. As heretofore pointed out, the evidence

shows only that the base of this semaphore was from 4 feet 7½ inches to 4 feet 10 inches from the nearest rail. It does not show how far a car would project over the rail, or the distance between a car and the semaphore or any other fact which would indicate that the semaphore was so close to the track as to endanger the safety of employees in the course of their duties. The burden of providing facts reasonably tending to show that this semaphore was negligently placed too close to the track, was upon respondent.

Coogan and *Gunning* cases, *supra.*

This, respondent has wholly failed to do. Not only has respondent failed to produce evidence tending to show negligence, but the evidence tends to show that the present obstruction was farther from the track than the obstruction involved in most or all of the cases hereinbefore discussed in which the court held that there was no negligence.

In the case of *Central of Georgia R. R. vs. Davis,* 7 Fed. (2d) 269, *certiorari* denied in 269 U. S. 578, relied on by respondent in the state court, the mail crane case involved was only *3 or 4 inches* from the outside of a passing coach. Here the danger of being struck was obvious. In the instant case the evidence wholly fails to show how near the semaphore a passing train would be. Petitioner earnestly submits, therefore, that respondent has wholly failed to prove any negligence, and that the decision of this court in the *Tyner* case, reversing the judgment for plaintiff under the authority of the *Leitch* case and others, is conclusive against liability on the facts in this record.

II.

The evidence is wholly insufficient to show the cause of decedent's death and leaves that question entirely to conjecture.

This question is raised by petitioner's fifth exception (R. 74).

In reversing the judgment for respondent on the former trial in the case of *Atlantic Coast Line Railroad Co. vs. Tyner*, 278 U. S. 565, this court cited, as one of its reasons for reversal, the case of *C. M. & St. P. R. Co. vs. Coogan*, 271 U. S. 472, thereby clearly indicating, petitioner submits, that the evidence on the first trial was insufficient to show the cause of decedent's death, and left the matter to speculation. Unless facts tending to show the cause of death can be arbitrarily taken from petitioner's plea of contributory negligence, which the State courts permitted to be introduced in evidence, the present record is wholly devoid of even any suggestion as to the cause of decedent's death, *because it does not show that decedent was on any car near the semaphore, or even show that he was on any train of petitioner the night he was killed.* We take it that no argument is needed to demonstrate that in this state of the evidence the *Coogan* case applies to defeat recovery.

It is true that the State Supreme Court did not in so many words attempt to use the facts in petitioner's plea of contributory negligence to show the cause of decedent's death, although it sustained the admission of that plea as evidence, but that court apparently attempted to show that the other evidence was sufficient

to sustain a finding as to the cause of death, as appears from the following quotation from its opinion (R. 92):

> "Fortunately for the plaintiff in this case, the circumstances are so many and so well knit together that a judge would be required to submit the facts and circumstances to a jury even in a criminal case. We have a strong young man twenty-five years of age, healthy and able-bodied, *in good health and apparent good spirits at the beginning of the trip,* with no known physical infirmity or defect; he is found dead beside the railroad track *a few moments after having been seen alive by his companions.* The dew on the ground is disturbed, the semaphore post *shows unmistakable evidence of having been struck* and there is evidence of human blood upon it; the skull of the deceased is found crushed, evidently from a lick of some terriffic force. *This tends to establish the rate of speed of the train, the fact that the post was too close to the track,* that *the deceased was on the side of the car riding where he had a right to ride* and where his duty often called him to ride and at a place provided for him to ride upon, that the cars were swaying and that his head came into collision with the semaphore post with a terriffic blow and caused him to be killed. *Foggy and dark,* the eye of man could not see and the eye of God will not disclose the exact manner of his death but these mute and silent circumstances, unchanged and unchangeable, speak silently of the manner and circumstances thereof." (Italics ours.)

The vice of this argument is that none of the facts and conclusions which we have italicized are to be

found in the present record; for example, there is no evidence whatever to support the statements that decedent was "in good health and apparent good spirits at the beginning of the trip", or was found dead "a few moments after having been seen alive by his companions", or that it was "foggy and dark", or that the semaphore post "shows unmistakable evidence of having been struck". These facts, thus improperly assumed by the State Supreme Court to exist, must be eliminated from consideration. That court's conclusion in the above quoted paragraph, therefore, that "this tends to establish the rate of speed of the train, the fact that the post was too close to the track, that the deceased was on the side of the car riding where he had a right to ride", is utterly unsupported by any evidence; and we further submit that if there were evidence in the record to show all of the facts stated in this paragraph of the opinion, they would not support the court's conclusion that decedent was riding on the side of the car when struck, and that the semaphore was too close to the track. The only facts in evidence on the second trial which were not in the evidence on the first trial (although a number of facts were in evidence in the first trial which were not put in evidence on the second trial), was testimony by decedent's brother-in-law, who arrived at the scene of the accident nine or ten hours after it happened and after a number of people had been around the semaphore, that he found "apparently blood stains" on the north side of the semaphore casing six or seven inches above

where the smoke and soot had apparently been wiped off (R. 49), and also testimony by this witness and a physician who exhumed the body some six years after the accident (R. 30, 49), that decedent had received a terrific blow on the back part of his head, crushing his skull. It is apparent that these facts do not even tend to show that decedent was riding on the side of a car and came to his death by striking a semaphore, as alleged in the complaint.

Coogan case, *supra.*

Philadelphia & R. Ry. Co. vs. Thirouin, 9 Fed. (2d) 856, 857 (3d Circuit).

The following from the *Thirouin* case is very pertinent:

> "It is argued that in searching for the trouble he may have leaned out beyond the car just as it came to the end of the bridge and that he may have leaned so far out that he was struck and swept off the train by the center girder. That may be true, but there is no evidence to prove it. Blood on one end of a girder and a foot at the other end of the same girder and the body on the opposite side of the track against another girder open a wide field for speculation as to how the accident happened and leave nothing certain except the fact of injury and death."

So far as its opinion shows, the State Supreme Court, apparently, did not rely on the facts contained in petitioner's plea of contributory negligence to show the cause of death, but erroneously concluded that the other facts it improperly assumed to be in evidence showed the cause of death. It may be, therefore, that

petitioner would be justified in relying on the error of the State Supreme Court in reaching this conclusion, without discussing the error of that court in admitting petitioner's plea in evidence and, we assume, giving it effect as such. But inasmuch as the facts in this plea should be given effect as evidence, if it were properly admitted, we will briefly discuss that question.

(a) *The State courts erred in arbitrarily admitting in evidence petitioner's plea of contributory negligence and in giving it effect as evidence.*

This question is raised by petitioner's first exception (R. 71).

Petitioner's counsel concede that, ordinarily, matters of procedure and practice are questions for determination of the state courts in actions brought under the Federal Employers' Liability Act, and the decision in these matters, fairly arrived at, will not as a rule be reversed by this Court. However, this Court has also held that a substantive right or defense arising under the Federal law cannot be lessened or destroyed by a rule of practice adopted by a state or state court.

Norfolk Southern R. Co. vs. Ferebee, 238 U. S. 269.

It has likewise held in the *Coogan* case, *supra,* and other cases, that both the *kind* and amount of evidence necessary to impose liability under the Federal Act is for the final determination of this Court. It is petitioner's contention, under this heading, that the admission in evidence of the seventh paragraph of the answer pleading contributory negligence (R. 54) was

arbitrary and unauthorized, and that the facts necessarily stated in this plea only for the purpose of this particular defense, cannot be deemed that kind of evidence which is necessary to impose liability. The plea itself, which was admitted in evidence, is set out on page 54 of the record, page 6 of the petition, and need not be repeated. It is the usual plea of contributory negligence as used in the Code states, and is stated to be a further answer to the complaint "and for a further defense to said action". The first part of petitioner's answer in denial (R. 7) admitted the allegations of the first, third and fourth paragraphs of the complaint, and then the second paragraph of the answer contained *a general denial of "each and every other allegation in said complaint not hereinbefore or hereinafter specifically* admitted." The answer nowhere "specifically admits" that decedent was on any car or the side of a car when it passed the semaphore, but the plea of contributory negligence or any plea in the nature of one of confession and avoidance, which a plea of contributory negligence is, must necessarily admit, either expressly or impliedly, the facts constituting the basis of the cause of action. At common law, as well as under the various Codes, this is denominated the "confession" part of the plea or "giving color". 49 *Corpus Juris, title "Pleading", Section* 357. Indeed, it is often held that an affirmative defense of new matter in the nature of a plea in confession and avoidance is bad where it contains merely a hypothetical admission of plaintiff's cause of action, although some Code states apparently permit, though do not require, hypothetical admissions. 49

Corpus Juris, supra, Section 358. We submit, therefore, that petitioner's answer when fairly construed under the usual rules of practice in force in South Carolina and elsewhere contains no admissions which may properly be used as evidence that decedent was on the side of a car and was struck by a semaphore. The cases cited by the State Supreme Court in its opinion on the question are not in point. In the case of *McJimpsey vs. So. Ry.*, 89 S. C. 122, cited by it, the general denial contained in the answer was only of every *material* allegation of the complaint and the court said it was doubtful whether this constituted a general denial, as it left uncertain what defendant considered "material" and, hence, the court gave effect, as evidence, to an admission in other parts of the answer that plaintiff was on defendant's cars. The difference in the general denials distinguishes the *McJimpsey* case.

The case of *Blake vs. Southern Ry.*, 126 S. C. 407, cited by the State Supreme Court, is distinguishable, as pointed out in the dissenting opinion of Cothran, J., because there defendant's second defense specifically stated that plaintiff was employed in interstate commerce, making that an admitted fact in the case. Cothran, J., wrote the opinion in the *Blake* case. The true rule applicable is well stated in the leading South Carolina case of *Stanley vs. Schoolbred*, 25 S. C. 181 (191), from which we quote:

> "But should we be in error in this, it would be necessary to inquire further, whether any evidence appears in the case tending to show that defendant was in possession of, or had trespassed upon, any of the land described in

the complaint. No witness has testified that the defendant has trespassed upon, or is in the possession of, any land claimed by the plaintiff, or, indeed, of any land at all. To establish this part of his case, *the plaintiff relies entirely upon the admissions in the answer.* We will first consider the admissions supposed to be made by the defendant, in pleading her second defense. Waiving any question (about which there might be grave doubt), as to whether the language there used would amount to an admission that the defendant was in possession of any portion of either Harris or the Jeffries grants, which, so far as we can understand, is the land to which the plaintiff claims title, it is sufficient to say that it is well settled that where a defendant pleads two defenses—one a general denial, *and the other by way of confession and avoidance, any admission contained in the latter cannot be resorted to by the plaintiff to establish the issue raised by the former.*

"As is said by *Pomeroy* in his work on *Remedies,* at page 743, Section 724: 'When a denial is pleaded in connection with a defense of new matter, or two defenses of new matter are set up, the admissions in the one can never be used to destroy the effect of the other. *The concessions of a defense by way of confession and avoidance do not obviate the necessity of proving the averments contradicted by the denial. This rule is universal.*' And again this standard author on the Code, at page 630, section 578, in speaking of the effect of the admissions of one of several defendants who have put in separate answers, says: 'The same doctrine extends to separate defenses of one party

in a single answer; the admissions in a defense of confession and avoidance do not overcome the effect of a denial contained in another.' Indeed, any other rule would, practically, deny to a party the right to plead a general denial, and a second defense by way of confession and avoidance. We think it is quite clear that any admission (if there is any) to be found in the second defense here pleaded cannot be resorted to, for the purpose of establishing the issue raised by the first defense." (Italics ours.)

The exact point in question was determined in *Charping vs. Toxaway Mills*, 70 S. C. 470, where it is said:

"It was held, nevertheless, in *Milean v. Ry. Co.*, 54 S. C. 485, 32 S. E. 539, the defense of contributory negligence may be pleaded in an answer which also sets up a general denial of all negligence on the part of the defendant, because any number of inconsistent defenses may be set up in the same pleading. *Cohrs. v. Fraser*, 5 S. C. 351; Code of Civil Procedure, Sec. 171. It has been held further, that where the defendant pleads a general denial and a further defense by way of confession and avoidance, *the admissions of the latter cannot be used by the plaintiff to establish the issues raised by the general denial. Stanley v. Schoolbred*, 25 S. C. 181; *Gilbreath v. Furman*, 57 S. C. 289, 293, 35 S. E. 516." (Italics ours.)

See also the following cases:

Brock vs. Nelson, 29 S. C. 49 (52).

Gilbreath vs. Furman, 57 S. C. 289 (293).

Hickson vs. Early, 60 S. C. 42 (51).
Glenn vs. Sumner, 132 U. S. 152.
Smith vs. Gale, 144 U. S. 509, 524.

In the *Glenn* case, *supra.*, this court said:

"In the record sent up the verdict unequivocally states that the jury 'find all issues in favor of the defendant', and the judgment repeats that 'all the issues raised by the pleadings' were so found. This necessarily includes a finding that the defendant was never liable to pay the assessment. This explicit finding cannot be controlled by statements of fact in those parts of the answer which set up as independent defenses *matters in avoidance*, or in a bill of exceptions, relating to one of those defenses only. *Such statements, made for the purpose of presenting the issue to which they relate, are not evidence upon any other issue in the same record.* As held by Chief Justice Marshall, sitting in the Circuit Court for the District of North Carolina, where the law authorizes a defendant to plead several pleas, *he may use each plea in his defense, and the admissions unavoidably contained in one cannot be used against him in another. Whitaker v. Freeman*, 1 Dev. L. 271, 280. See also *Knight v. McDougall*, 12 Ad. & El. 438, 442; *Gould v. Oliver*, 2 Man. & Gr. 208, 234; S. C. 2 Scott, N. R. 241, 262." (Italic ours.)

The italicized language is directly applicable to the question under discussion.

In the case of *Smith vs. Gale, supra.*, in which this court distinguishes the case of *Glenn vs. Sumner*, it is stated that there are "no inconsistent defenses" in the

Smith case. Certainly, the defense of contributory negligence is wholly inconsistent with a denial of liability by defendant, which petitioner's answer does deny. It is also stated in the *Smith* case that the defense there "is in reality a single one". In the instant case the answer not only contained a general denial, but contained in the fifth and sixth paragraphs (R. 9) a "further defense" of assumed risk, which is a plea of new matter in the nature of a plea of confession and avoidance, and also contained in the seventh paragraph a similar plea of contributory negligence. Many other cases in point on this question are cited in the dissenting opinion of Cothran, J.

We submit that the action of the State courts in admitting this plea in evidence and permitting its consideration as such, was wholly arbitrary and unauthorized, *and that the matter contained* in such plea *cannot be considered as evidence to supply any fact imposing liability.*

III.

Under the evidence, decedent assumed, as a matter of law, any risk of injury from the position of the semaphore.

This question is raised by petitioner's fourth exception (R. 73, 74).

In its opinion reversing the judgment for respondent in the case of *Atlantic Coast Line Railroad Company vs. Tyner* this court cited the cases of

Southern Pac. Co. vs. Berkshire, 254 U. S. 415.

C. & O. Ry. vs. Leitch, 276 U. S. 429.

thus unmistakably indicating its opinion that under the evidence then in the record, the decedent assumed the risk of injury from the semaphore. The evidence on the second trial, and now in the record on the question of assumed risk, is not greatly different on material matters from that in the evidence at the first trial. The undisputed evidence shows that decedent, Marshall, was an experienced railroad man, and had worked in the Charleston yard as a switchman three weeks at the time he was killed, and for about three months before that time at the same place (R. 12). All of the switchmen in the yard go out to Bennett's Yard near by where trains are also made up (R. 40), and decedent must have, necessarily, gone out there (R. 41); his work as switchman took him constantly up and down the road (R. 42); the semaphore had been in the same condition at least since 1919 (R. 43), the accident occurring in 1923. Semaphore 3911 is on a straight piece of track (R. 20). All switchmen and railroad men know about semaphores being along side the track (R. 53), and also know that freight cars sway from side to side from ten to twenty inches, according to respondent's testimony (R. 40, 41, 42, 45, 46 and 47). Rule No. 706, in effect when decedent was killed, reads (R. 53):

> "Employes are required to inform themselves respecting the location of all *structures or obstructions along the line which will not clear them when on top or sides of cars.*"

Under these facts and under the *Berkshire* and *Leitch* cases, cited by this court as reasons for revers-

ing the first judgment rendered, decedent assumed any risk of injury from contact with this semaphore. In the *Berkshire* case the court said that the engineer had passed over the route many times "and must be presumed to have known of the crane" The same inference must be made in this case, as decedent had, according to the evidence, constantly ridden up and down the road in the course of his duties (R. 42). Proof of actual, admitted knowledge by the employe, of danger from the semaphore, and his appreciation thereof, can rarely be shown in this class of cases, especially where the employe is killed in the accident. The remarks of the State Supreme Court in its opinion, therefore, that there cannot be assumption of risk in this case, in the absence of proof that the risk was fully known and appreciated by decedent, are beside the point. The *Leitch* case, which we discussed and quoted from in our discussion on negligence, is also directly applicable to these facts on the question of assumed risk. The State Supreme Court took the position in its opinion that both the *Berkshire* and *Leitch* cases were restricted in their operation to "mail crane cases", but it is apparent that this cannot be true, or else this court would not have specifically cited these cases in its opinion reversing the judgment for plaintiff on the first trial of this action (*A. C. L. R. R. Co. vs. Tyner*, 278 U. S. 565).

In the case of *McCully vs. Monongahela*, 289 Pa. 393, *certiorari* denied 275 U. S. 542, it was also held that the trainman assumed, as a matter of law, the risk of injury from the coal tipple. There the trainman had made several trips along the route.

Furthermore, if petitioner's plea of contributory negligence, which was put in evidence by respondent, is properly in evidence, it shows, without dispute, that the "*presence and location*" of the semaphore mentioned in the complaint were well known to the deceased. Respondent put in evidence the whole of the seventh paragraph of petitioner's answer (R. 10), and the court instructed the jury that they could consider all the facts set out in that paragraph (R. 73), which include those above quoted. There is no other evidence conflicting with any fact stated in this part of the answer, or even remotely bearing thereon: hence, there is no reason whatever why all of the facts stated therein should not be taken as true, if any of them are, and neither the court nor the jury could arbitrarily or capriciously say that some of the facts are true and others are not. It would be most unfair if respondent were permitted to introduce the whole of this plea in evidence and then maintain that only the part of it which was favorable to respondent should be considered as having any legal effect. The law is to the contrary. The rule is stated in 22 *Corpus Juris*, title "*Evidence*", *Section* 449, as follows:

> "When an entire statement is admitted in evidence, *the self-serving part of it must be duly considered and weighed together with the unfavorable part.*
>
> "But all parts of the statement are not necessarily to be regarded as worthy of equal credit. The triers of fact may reject such portions, if any, as appear to be inconsistent, improbable, or rebutted by other circumstances in evidence;

but they are not at liberty to disbelieve the self-serving part capriciously and without any reasonable grounds; and it has been said that they cannot believe part and disbelieve another part unless such parts are distinct and relate to different matters or facts. The assertion of a legal right to do an act, coupled with an admission that the party did the act, does not neutralize the admission." (Italics ours.)

The same rule is laid down in the South Carolina cases of

Cohen vs. Robert, 2 Strobhart, 410-416 (S. C.).
Carrier vs. Hague, 9 Rich. 454, 459.

In the latter case the Supreme Court of South Carolina said:

> "Prior to the opening of the defense the plaintiff resorts to the answer and produces it as evidence in his behalf. He must take it as it stands, and cannot be permitted to carve out a part and reject the residue, which qualifies, explains or pertains to the portion selected."

In the *Cohen* case it is held that where plaintiff put in evidence defendant's affidavit as an admission of the trespass complained of, plaintiff "thereby also made evidence the defendant's declaration, in the same affidavit, of the circumstances which incited him to the violence he committed" and could not exclude such declarations from consideration.

The principle enunciated by this court in *Gunning vs. Cooley,* 281 U. S. 90 is also applicable. It is there said that where plaintiff produces evidence that is

consistent with a hypothesis that defendant is not negligent, and also with one that he is, *his proof tends to establish neither*. Here respondent offered a part of our answer, apparently, to show that decedent was on the side of a train and struck a semaphore, but this same part of the answer which was put in the evidence by respondent also showed that he well knew the "presence and location" of this semaphore, which would make him assume the risk of injury therefrom as a matter of law, under the foregoing cases, and petitioner earnestly submits that this must be the effect of this evidence (if it were admissible at all), as well as of the other evidence hereinbefore referred to.

Conclusion.

This case has been tried twice and judgment for large amounts rendered in each trial for respondent. The judgment on the first trial was reversed on certiorari by this court in an opinion citing authorities already mentioned, which made it certain that, in the judgment of this court, the evidence on the first trial was conjectural as to the cause of the accident, and also showed assumption of risk as a matter of law, together with the citation of another case on the error in the first trial in instructions on damages. As we have attemmpted to point out, the evidence on the second trial is much less specific as to the facts and much weaker as going to show negligence or the cause of the injury, and is even stronger as showing assumption of risk by the decedent. We submit, therefore, that the decision of this case is governed by the decision on the former appeal in the Tyner case, and that decision

and the cases therein cited require the reversal of the present judgment. In as much as respondent has had the opportunity in two trials to develop facts imposing liability on petitioner, and has wholly failed to do so, the judgment should now be reversed without ordering a new trial.

Respectfully submitted,

THOMAS W. DAVIS,
Wilmington, N. C.;
ARTHUR R. YOUNG,
Charleston, S. C.;
V. E. PHELPS,
Wilmington, N. C.,
Attorneys for Petitioner, Atlantic Coast Line Railroad Company.

December 8, 1930.

FILE COPY

FILED
JAN 12 1931
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1930

No. 600

ATLANTIC COAST LINE RAILROAD COMPANY.
Petitioner,

—vs—

J. L. POWE, Administrator of George A. Marshall, Deceased, - - - - - *Respondent.*

BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

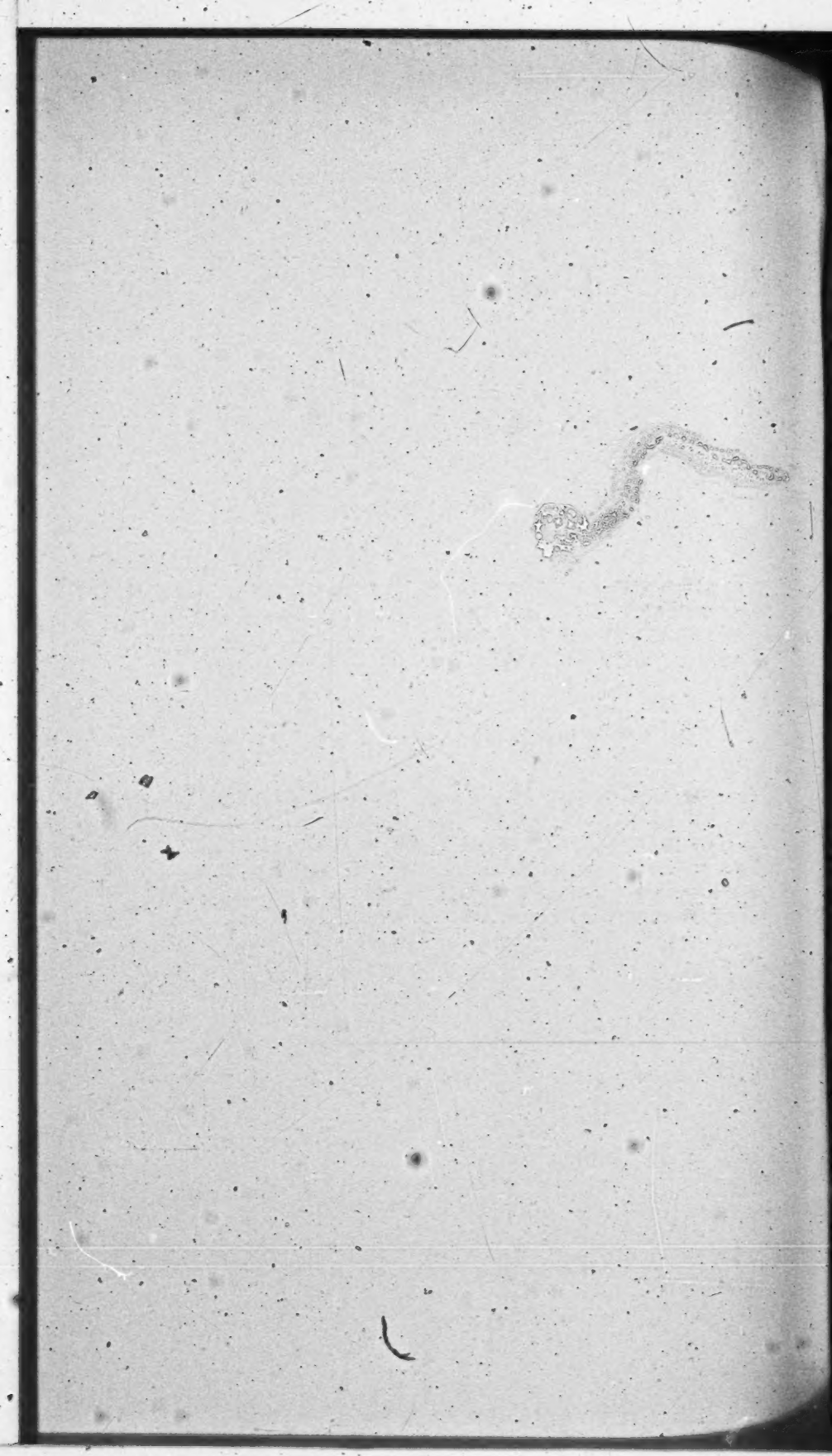
LOGAN & GRACE,
Attorneys for Respondent.

INDEX:

	Page
STATEMENT OF FACTS	1
ARGUMENT	2
SUFFICIENCY OF EVIDENCE	2
ASSUMPTION OF RISK	7

TABLE OF CASES CITED:

Chicago M. & St. P. R. Co. v Coogan, 271, U. S. 472	2
Central Ry. Co. v Davis, 7 Fed. (2nd) 269	8
Central Ry. Co. v Davis, 269 U. S., 578, 70 L. Ed., 422	8-10
Southern Pacific Co. v Berkshire, 254 U. S., 416	8
Gila Valley Ry. Co. v Hall, 232 U. S., 94	11
Ches. & O. R. Co. v Leitch, 276 U. S. 472	8



Supreme Court of the United States

OCTOBER TERM, 1930

No. 600

ATLANTIC COAST LINE RAILROAD COMPANY
Petitioner,

—vs—

J. L. POWE, Administrator of George A. Marshall, Deceased, - - - - *Respondent.*

BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

STATEMENT OF FACTS

The statement of facts as summarized in the brief of Lionel K. Legge, of Counsel for Respondent herein is adopted by us, and makes it unnecessary to make any further statements.

ARGUMENT

At the first trial of this case, the plaintiff, in order to show by circumstantial evidence the cause and manner of death, relied on the testimony of the coroner who was called to the scene of the accident immediately afterwards, and of the train engineer who got down from his engine upon report that the man was missing and walked back to the place where the dead man lay.

SUFFICIENCY OF EVIDENCE

An examination of the record led this court to hold, under the Chicago M. & St. P. R. Co. vs Coogan 271 U. S. 472, that this testimony was not enough.

The coroner's testimony was important in certain of its features, and although the coroner was dead at the second trial, the record of his testimony under our rules was again put in evidence. The testimony of the engineer, however, was not again put in evidence. As the engineer could "not remember" at the first trial anything more than he testified, the lapse of time would not have helped his memory. Besides, he was not an eye witness, was a hostile witness and being in the employ of the Company would presumably remember nothing more than he reluctantly remembered at the first trial. Te brief of the petitioner would make it appear that because we did not choose to put up the *same* evidence as we put up at the first trial, which this court held insufficient, we therefore did not put up *as much* evidence, notwithstanding we put up *different* evidence and evidence of a quality which we knew was necessary to meet the doctrine of the Coogan case and the demands of this Court.

The petitioner, throughout its brief, both before our State Supreme Court and before this court, suggests practically that in some respects we had no right to put up this new evidence. The courts have found that we had a right to do so. We submit that the very earnestness which petitioner shows in this particular indicates that we did put up, from

its standpoint, *damaging* evidence. It is true that this new evidence to which it objects was compassed within a very narrow scope. It was only a few words. But we submit it was of the very essence of evidence and was all the more valuable because it came not from our lips but from the lips of the petitioner itself. It will be recalled that there is nothing in the nature of direct evidence in the record of the first trial as to exactly how decedent came to his death. Circumstances, yes; circumstances which spoke with more emphasis and with more clarity in a local court house before a listening jury than in the cold printed word of the record which came up to this court and which this court held, under the Coogan case, were not of the character of such circumstantial evidence as would make out a case.

Very well; at the second trial, we made up our minds that the petitioner (defendant) would not again have the excuse that "the evidence is wholly insufficient to show the cause of decedent's death, and leaves that question entirely to conjecture." The petitioner had gotten away with this contention on the record of the first trial. It rang through its brief before this court. It was even contended in oral argument here that for all this court knew, the decedent might have suddenly dropped dead at the semaphore post. Who could say otherwise? Nothing he contended could be taken from the fact that he was dead or that he was dead near the semaphore post, and that he had been a young man, just a few minutes before, apparently in the prime of health. It was more "speculation", although he was dead, that his death had any relation to the time, place and circumstances.

Unfortunately, the coroner had failed to have an autopsy performed. We maintained that this was because the cause of his death was so obvious that no autopsy was necessary. But that also was only "speculation". Passing over the fact that if the decedent had just dropped dead while out in the discharge of his duty at 3.30 in the morning, the Railroad Company would not have stopped all of its operations until the coroner came and would simply have

brought the body in with the report that he had dropped dead; passing over the testimony of the engineer at the first trial out of which the jury could have drawn no other reasonable inference than that the engineer stopped his train, went back and found the dead body by the semaphore post, "with the dew brushed off", which connected the two things in his mind; and determined to adhere strictly to the meaning of the decision of this court in this case that there was a missing link, we put in *two* species of new evidence at the second trial which the petitioner seems to ignore in its probative value.

First: We went out to the grave yard where decedent was buried, dup up his body, safeguarding the transaction with every precaution as to identity, and had the physician who attended him in life examine his remains, dissect his skull from his body, guard it carefully, bring it into court with his own hands and show it to the jury, accompanied by his positive testimony that the man had come to his death by a most terrific and violent blow on the back of the head, which literally shattered his skull into fragments, as exhibited in court.

Second: Remembering (of which this court will take judicial notice, perhaps) that under the rules of the Interstate Commerce Commission, carriers under the Employers' Liability Act are required to hold immediate inquiry after such accidents, but without having the power to force the production of the report on this inquiry, we nevertheless reasoned that the defendant itself must have been governed by the inquiry and must perhaps have made up its answer to the complaint in this case based upon it. This was a sworn answer. Under the weight of authorities, the facts set up in pleadings will not be taken as admissions in the form of evidence, unless as such, they are proved as any other fact would be proved in the trial of the case. So we carefully introduced at the second trial under our right to do so by the decisions of our Supreme Court, of this Supreme Court and of the great majority of the Supreme

Courts of the land, the exact fact which the defendant swore to in his answer as being the instrument causing the death of the plaintiff to wit: the semaphore. In other words, in response to the allegations of our complaint which were (T. R. f. 11):

> "While the said George A. Marshall was mounting the ladder of one of the cars attached or while examining the defective car as aforesaid, the defects in which were due to the negligenc of the defendant herein, thereby necessitating that said decedent examine the same, and while thus engaged in the duties incident to his employment, he was struck by said signal device or obstruction and thrown from his train and so badly injured as to cause his death soon thereafter."

The defendant in paragraph Seven of its answer, swore:

> "Further answering said complaint . . . . . this defendant alleges that the injuries and death of the deceased . . . . . (d) in leaning outward from the ladder of said freight car so far as to bring his body in contact with the said semaphore".

The defendant in its answer had not denied all the allegations of the complaint, but only such as were not "hereinabove or hereinafter specifically admitted."

It is true that the fact of the manner of the decedent's death in paragraph Seventh which we proved as a part of the defendant's answer, was set up as a fact by the defendant for the purpose of proving "contributory negligence". But the fact was not set up "hypothetically". It was set up absolutely as a fact. It is true, also, that a defendant may, under our code pleading, set up as many inconsistent defenses as he will. But when in the course of an answer in response to a complaint which has not been met with an "unqalified denial", the defendant for any purpose sets up a fact of which he hopes to take the benefit, he is bound by the fact and he may not afterwards deny it for his own

benefit. He cannot play fast and loose with facts. He cannot withdraw facts at his pleasure. After we pinned him down in this case by proving this fact, he squirmed and tried to withdraw his plea of contributory negligence, which he could do, of course, and which the trial judge allowed him to do. But he could not withdraw the fact that had been proved. Moreover, the potency of this fact lies in that it arose out of an investigation by the defendant after the accident when it was in possession and had dominion over everyhing that could throw any light upon the case. It came to the conclusion that a miracle had not happened; that this vigorous young man had not suddenly dropped dead by the semaphore post, but with the semaphore post in its possession, with the box car in its possession, with the blood stains on the semaphore post in its possession, with the dew rubbed off the semaphore post in its possession, with the blood on the ground by the semaphore post in its posession, with the dead body lying in the midst of all this in its possession, with every motive on the part of itself and its witness to exculpate themselves and to say, if possible, that the death was simply a mystery, defendant solemnly swore that there was no mystery about it at all, that he was killed by the semaphore and in order to exculpate itself it put up the plea of contributory negligence, which it withdrew only at the trial because it thought by doing so, it might deprive truth of the value of a fact.

So that this case comes back before this court not under the Coogan case, not with "circumstances presumed" from which further presumptions are inferred, and therefore in the realm of speculation as to the cause of death, but with the shattered skull of the decedent before the jury, the testimony of the doctor that the condition of the skull could only have been caused by coming into contact with something such as the semaphore post before the jury; with the testimony of the new witness, Tyner, that the blood was on the semaphore post, before the jury; and with the sworn admission, proved this time as a substantive fact in the case by the defendant that such was how the decedent came to his death, before the jury.

Although the petitioner makes three points in his argument in support of his petition for a writ of certiorari, these points really divide themselves into only two principles. We have disposed of the principle of evidence involved in the Coogan case. The other principle involved is that of Assumption of Risk.

ASSUMPTION OF RISK

On the question of assumption of risk, this case was sent back on the Berkshire and the Leitch cases. We realized, of course, that unless there was a wholly different principle involved in this case, though it was not clearly brought out at the first trial, distinguishing this case from the Berkshire and the Leitch cases, we would be out of court on the question of Assumption of Risk.

We had causually and incidentally proved at the first trial that the semaphore post in this case, at which the decedent was killed, was only 5 ft. 4 inches from the outer edge of the rail. An examination of the records at the second trial will prove: that the decedent was a switchman who had worked twice for the Atlantic Coast Line, once at Florence, some years before, and that he had been recently before his death re-employed to work in the Charleston yard, where he had worked for three months and where, presumably, he was familiar with the ordinary risks of the yard, the obstructions that were there, or with the extraordinary risks, if they were obvious, etc. But he was not killed in the Charleston yard with which he was familiar. In an emergency, at 3.30 o'clock in the morning when it was dark and foggy, he was suddenly called out to do extra duty to wit: to help clear up a wreck on the main line five miles from Charleston. While out there, a defect arose on the brake of one of the cars. He knew nothing about semaphore posts, and he particularly knew nothing about the fact that, contrary to all other cases of the location of semaphore posts, the defendant Company had placed the fatal semaphore post, 3911, unusually close to the track. All he knew was that in the darkness of this night, his duty

called him to hang down from the ladder to watch the defective brake lest there might be another accident. He would have been negligent if he had not done so. The farthest thing from his mind, and of which he had no previous knowledge was that, for its own convenience, his Master had in one case placed a semaphore post where he would be killed by it unless he knew, or ought to have known, that it was there. The jury heard the testimony and heard the judge's charge, to which no exception was taken on the question of assumption of risk. It was for the jury to say whether this poor man had met his death, not through his fault, but through the fault of the defendant Company. In the petitioner's brief, he seems to suppose that we are so silly as to maintain that the principle involved in the Berkshire and Leitch cases was that only mail cranes could be put as the mail cranes were placed in these cases. On the contrary, we know that the principle in those cases was that because the railroad company was required to have these mail cranes where they were placed, and that they were always placed there, train crews were supposed to know that and therefore assumed the risk that they were there and must look out for them.

Fully understanding the Southern Pacific C. v Berkshire, 254 U. S. 416, 41 S. C. 162, 65 L. Ed. 335 and Ches. & O. R. C. v Leitch, 276 U. S. 472, we respectfully submit that the case at bar falls squarely within the case of Central of Georgia Ry. Co. vs Davis, 7 Fed. (2nd) 269. In that case, this court denied a writ of certiorari, 269 U. S., p 578, 70 Law Ed. p 422. The denial of the writ is tantamount, we submit, to sustaining the doctrine of that case which was concurred in by the three judges of the Fifth Circuit. In that case, the Berkshire case was fully considered and the court said, (p 270):

> "The case is quite different from Southern Pacific Co. v Berkshire, 254 U. S. 416, 41 S. C., 162, 65 L. Ed 335. In that case it was held that an experienced locomotive engineer who had operated many times over a railroad where mail cranes were uniformly set up close to the track was to be presumed to have known the danger of being struck when leaning from his cab

window while passing a mail crane. It is to be inferred that, in reaching the conclusion in that case, that the engineer 'perfectly well knew of the existence of the crane where it stood', the court was influenced by the considerations that he was charged with the duty of keeping a lookout ahead, and that there was uniformity in the location of mail cranes with reference to the track traversed by the engineer. Pertinent authorities support the conclusion that in the instant case, it was not a necessary inference from undisputed evidence that the deceased, while performing his duties as a flagman, must have become aware of the location of the mail crane platform with reference to the track and must have realized the danger therefrom". (citing cases).

We have examined the briefs in the Berkshire case of which we have copies. From the agreed statement of facts, page 5 of the petitioner's brief, Case No. 106 in the Supreme Court of the United States, October term, 1919, we quote:

> "The undisputed evidence in the case showed that Linder had made ninety-nine trips over defendant Company's line from El Paso to Deming, New Mexico, by the station of Carney, New Mexico, where the mail crane is located, from July 1, 1914, to December 21, 1914, and had made one hundred and fifty-four trips over said company's line past the point of the accident, during the six months immediately preceding his accident on July 3, 1916, and during all of this time the said mail crane was in the came position and similiarly located as it was at the time of the accident to said deceased Linder. . . . . "

And again, on page 6:

> "All cranes are at a standard distance from the side of the car, that is, they are all the same distance exactly. . . . .could be seen half a mile down the track by the engineer when traveling in the direction in which

deceased was traveling at the time of the accident to him. . . .

"It was pleaded by plaintiff and urged strongly that the defendant had been negligent in placing the mail crane too near the tracks, but it was positively shown without contradiction that this mail crane at Carney was similarly situated to all the other cranes on defendant's lines".

In the Davis case, supra, the facts were quite different and practically identical with the facts in this case. We quote from that case:

"While Davis, after the train got in motion again, was standing on the bottom step of a passenger coach, facing towards the rear of the train, stooping or leaning and looking under a coach, to discover the cause of a noise that was heard, having his head several inches out from the side of the coach, he was struck by the mail crane platform which was on the same side of the train as that on which passengers got off and on. That platform was North of the crossing. It was built around the bottom of a mail crane, and its purpose was to provide a place for a person to stand on while hanging a mail sack on the arm of a crane. It is about 4 feet high and was 3 or 4 inches from the outside of a passing coach. *Other mail cranes along the line Davis served on were iron cranes, with ladders, and did not have a platform around them.*"

On the direct point of the assumption of risk, the court said:

"The above-mentioned ruling is complained of on the ground that under the undisputed evidence the deceased assumed the risk due to the presence of the mail crane platform at the place above indicated. The evidence warranted a finding that the employer was chargeable with negligence in permitting that object

to be unnecessarily near the track. In order to charge an employee with the assumption of a risk attributable to a defect due to the employer's negligence, it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew that it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it. Gila Valley Ry. Co. v Hall, 232 U. S. 94, 102, 34 S. Ct. 229, 58 L. Ed. 521. We are of the opinion that under the circumstances disclosed by a phase of the evidence it was properly a question for the determination of the jury whether the deceased did or did not know of the location of the mail crane platform and of the danger therefrom to trainmen on passenger trains. The evidence as to the circumstances under which the deceased daily passed that object was not such that it required the inference that he knew of its location and realized the danger therefrom to one who in passing on a train has the whole or part of his body out from the side of a car. In passing on the question whether the deceased did or did not know of and appreciate the danger, the jury might properly be influenced by the considerations that the mail crane's platform in question was the only structure of its kind on the line on which deceased served; that at the times when he had an opportunity to observe it, he probably was engaged in assisting passengers off and on the train and in performing other duties of a flagman, incident to the stopping and starting of the train, and, so far as appears, was not charged with the duty of looking out ahead for obstructions near the track; and that, if he casually saw the platform quite a distance from him, he, without being negligent, might have failed to realize how far it was from a passing car. The case is quite different from Southern Pacific Co. v Berkshire".

Our case is even stronger than the Davis case. Davis "had been a flagman on the same train for several months and had passed Arkwright in the day time each day

during that time". The decedent, Marshall, in the instant case had never passed the place where he was killed. It was not his duty ordinarily to be there but five miles away doing yard work. It was not his duty to look out for obstructions on the side of the track. If he had looked out at 3.30 o'clock on a dark morning, he could not have seen this obstruction. He had a right to presume it was not there, as no other semaphore was placed so close to the track. The fact that he did not see it cannot be better proved than by his shattered skull, for surely, if he had seen it, he could have readily moved his head and saved his life. These were the points that were emphasized at the second trial and which, in the atmosphere of the case, must have been so strong and so different in their import than the facts of the first trial that the defendant made no motion for non-suit, which he did at the first trial.

Petitioner makes an effort to hold the Supreme Court of our State guilty of having mixed the facts of the first trial with the facts of the second trial. Of course the second trial, at the trial court, was not tried upon the facts of the first trial. Those facts were not presented to the jury in anyway whatsoever. Moreover, the trial judge charged the jury (T. R. f. 254) .....

> "And right at the beginning, I want to say to you that what was done in the other case has nothing to do with this case. You and I are trying this case just as if it was coming into court for the first time and we must do it that way. What is the case that has been made before us as presented by the plaintiff? That is what we must act on and nothing else".

It is a well settled ancient principle of law that if a decision is sound, the reasoning of the court in coming to its conclusion is immaterial. When the case went up before the State Supreme Court for the second time, a

mass of records had been accumulated. The new record, however, of the second trial, and the new briefs, were all that were before the Supreme Court and it was upon these that the case was argued and the court came to its conclusion offhand, by four to one. In writing the opinion of the court, Associate Justice Graydon incorporated some of the facts that had been adduced at the first trial. It is perfectly clear, however, that the merits do not rest upon these facts, but on the salient facts of the second trial. He knew and the three other members of the court who concurred with him knew what the Supreme Court of the United States had previously ordered in this case, and precisely upon what points of law the new trial depended. It is a case which has become more or less a cause celebre in our State. Marshall was killed on January 6, 1923. The case did not come on for a hearing until many preliminary motions were disposed of before the resident circuit judge. These motions were heard on June 19, 1924, and orders were filed by Judge R. W. Memminger on June 29, 1925. He is now dead. When Marshall was killed, he left two children in the flesh and one child still in its mother's womb and that child is now nearly eight years old. The coroner who examined his dead body is dead. Judge DeVore, who was first trial judge, is now dead. Some of the witnesses and several of the jurors at the first trial are dead. The very writer of the opinion now before the Supreme Court, Associate Justice Graydon, was sitting when the case was heard this time in place of Chief Justice Watts, who was then ill, who presided at the hearing before our Supreme Court the first time. Chief Justice Watts is now dead. The venerable Chief Justice of this court, the lamented Taft and one other member of this court, before whom we appeared last, have since themselves appeared before the Great Judge. The widow and her three children have waited eight years during the law's delays, living on charity, and the bounty of her father, who was the plaintiff in the first case, the administrator of the deceased and who himself is now

dead. And now this case comes back before this court with a new administrator, still holding out in this temple the open palm in which we hope may drop at last the word of justice for this poor and weary widow and her children who have waited so long. Our State Supreme Court has again, by a four to one decision, left the matter in the hands of this court. But again, the great dissenter of our State Supreme Court in such cases, Associate Justice Cothran, has chosen to withhold his approval, and to take the side of the defendant railroad company. It would seem that if the petitioner in this case had regarded the error of the writer of the opinion in this case, based as it was upon some confusion about the record, as prejudicial to it, it would have asked for a re-hearing; because certainly if our Supreme Court had thought that this error was not a harmless error, but affected the merits of the case, it would have granted the rehearing and reversed the lower court carefully on the record. It is so obvious a mistake that the dissenting justice, if he had thought it important, would have called the attention of his four brethren to the fact that while he dissented from their opinion he knew they did not wish to base their opinion upon a manifest error of the record. They would, of course, have been governed accaccordingly. Certainly the four members of our Supreme Court would not perversely and contumaciously refuse to be governed by the record. For the petitioner to have sat silent and the dissenting justice to have written his opinion without asking his brethren to correct this error ought to be a clear indication to this court that the error was not regarded as one that would not have been at once corrected without affecting the decision in the case. It was altogether unnecessary, after these eight years, and after the story of the deaths which we have recited, for this widow and her orphan children to be dragged again up to the Supreme Court of the Untied States if in truth the error was correctible below. With all due respects, it seems like trifling with the majesty of justice and with the dignity of our State Supreme Court, as well as the

august Supreme Court of the United States to have prolonged the time and multiplied the expense of this cause by what could well be denominated a "trick of silence."

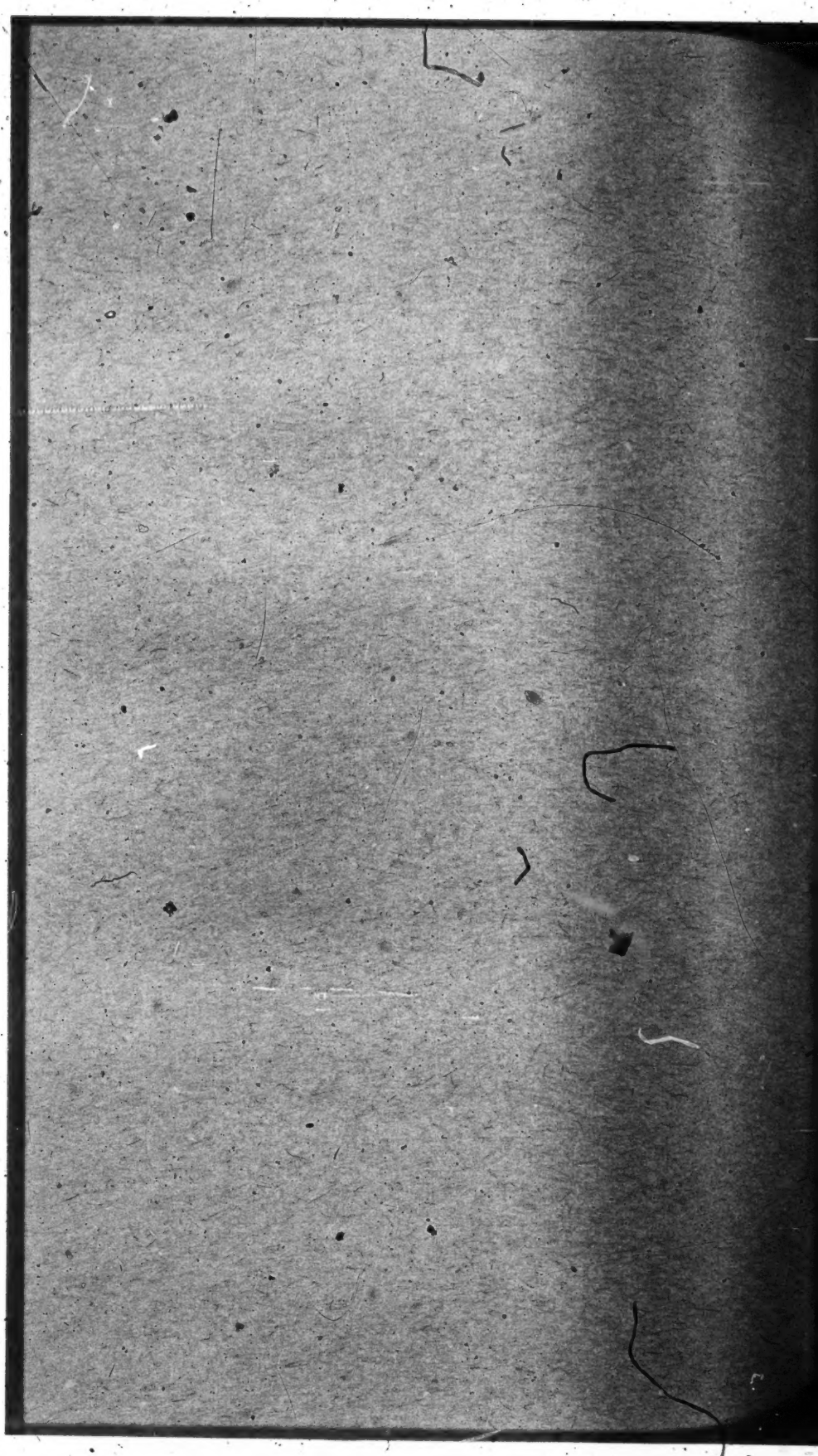
Therefore, there appearing upon the record no prejudical error, we pray that this petition for the writ be dismissed.

Respectfully submitted,

W. Turner Logan

LOGAN & GRACE,

Attorneys for Respondent.



FILE COPY

FILED
JAN 12 1931
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1930

No. 600

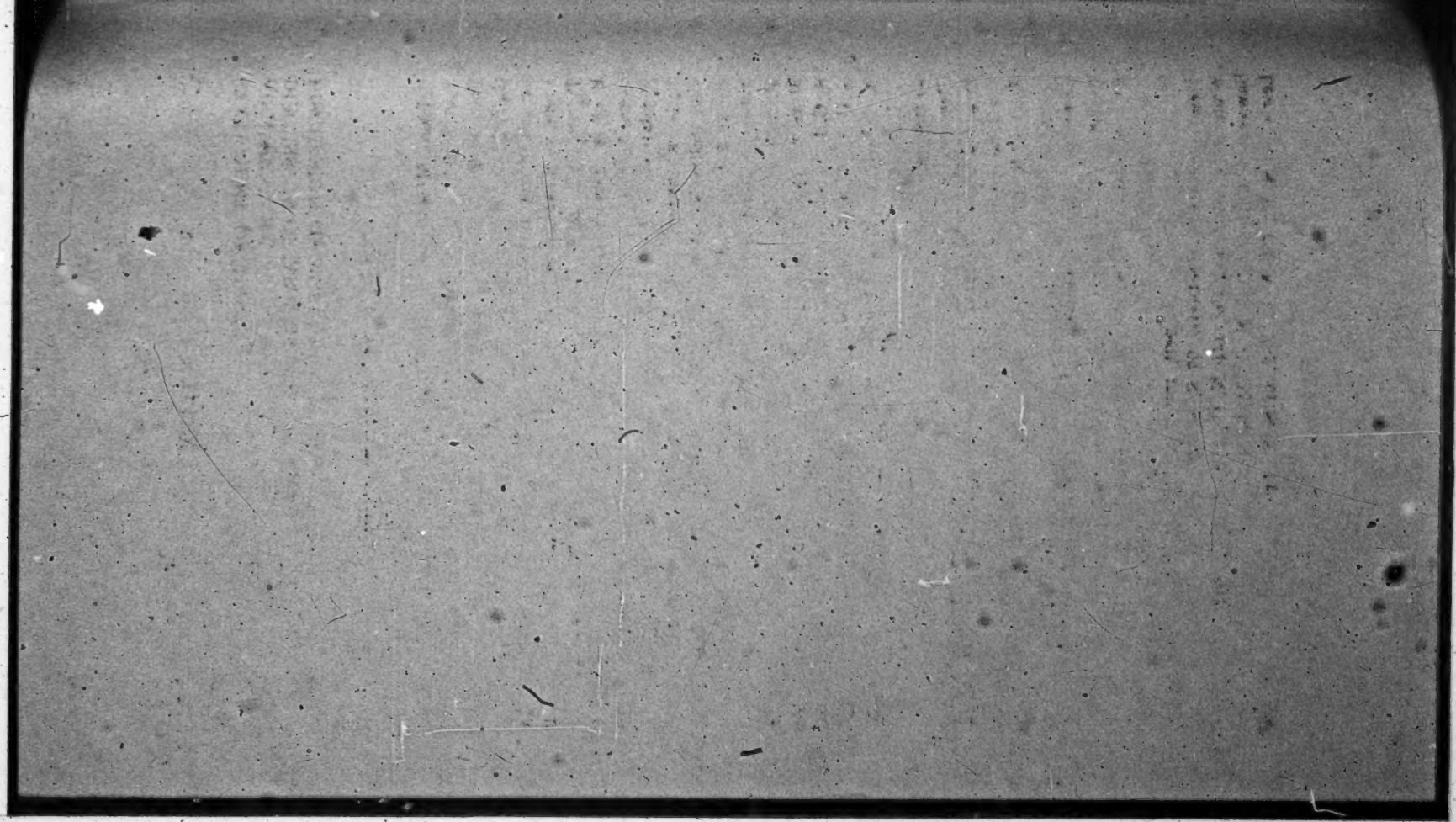
ATLANTIC COAST LINE RAILROAD COMPANY.
Petitioner,

—vs—

J. L. POWE, Administrator of George A. Marshall, Deceased, - - - - *Respondent.*

BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

LIONEL K. LEGGE,
of Counsel for Respondent.



INDEX:

	Page
STATEMENT OF FACTS	1
ARGUMENT	5
DISCUSSION OF ASSUMPTION OF RISK	6
DISCUSSION OF SUFFICIENCY OF EVIDENCE	15

TABLE OF CASES CITED:

Chicago, M. & St. P. R. Co. vs. Coogan, 271 U. S., 473	1, 15
Southern P. Co. vs. Berkshire, 254 U. S., 415	1, 13
Ches. & O. R. Co. vs. Letich, 276 U. S., 472	1
Gulf, C. & S. F. R. Co. vs. Moser, 275 U. S. p. 133	2
Central of Ga. Ry. Co. vs. Davis, 7 Fed. (2d Ser.) 269	4, 6, 11, 14
Frese vs. Chicago, B. & O. Ry., 236 U. S. p. 1	9
Toledo, St. L. & W. Co. vs. Allen, 276 U. S., 165, 72 L. Ed., 513	9
Boldt vs. Pen. R. Co., 245 U. S., 445, 62 L. Ed., 385	10
Ches. & O. R. Co. vs. Mixon, 271 U. S., 219, 70 L. Ed., 519	10
Randall vs. B. & O. R. Co., 109 U. S., 478, 27 L. Ed., 1003	10
Tutle vs. Detroit, G. H. M. A. Co., 122 U. S., 189, 30 L. Ed.	10
Gila Valley Ry. Co. vs. Hall, 232 U. S., 94-102, 58 L. Ed., 521	13
Texas & Pac. Ry. Co. vs. Swearingen 196 U.S., 51, 49 L.Ed. 382	14
Tabor vs. Davis C. C. A., 280 Fed., 612	14
Mamoth Oil Co. vs. U. S., 72 L. Ed., 15	18
Blake vs. So. Ry., 126 S. C., 407	20, 21
A. C. L. R. R. vs. Davis Admr., 279 U. S., 34, 73 L. Ed., 601	20
Gulf, M. & N. R. R. vs. Wells, 275 U. S., 455, 72 L. Ed., 370	20
A. C. L. R. R. Co. vs. Driggers, 279 U. S. 787; 73 L. Ed., 957	20
A. L. R., 14, p. 98	22
McJimpsey vs. [illegible] Ry., 89 S. C., 125	24
Glenn vs. Sumner, 132 U. S., 152	25, 26
Smith vs. Gale, 144 U. S., 509, 36 L. Ed., 521	25, 26
Lee Line Steamers vs. Robinson, 218 Fed., 559	26
N. O. & N. E. R. R. Co. vs. Jopes, 142 U. S., 18, 25, 27, 35 L. Ed., 919	26
Steamboat Co. vs. Brockett, 121 U. S., 637, 646, 647, 648	27
Pendleton vs. Kinsley, 3 Cliff., 416, Fed. Cases, 10, 922	27
Alabama City, G. & A. Ry. Co. vs. Sampley, 169 Ala, 372; 53 So., 142	27
So. Ry. vs. Fidher, 74 S., 580, 199 Ala., 377	28
Jones vs. Norfolk Southern, 97 S. E., 52	28
Wade vs. Contracting Co., 149 N. C., 177, 62 S. E., 919	29
Sawyer vs. Railroad, 145 N. C., 24, 58 S. E., 598	29
Lewis vs. R. R., 132 N. C., 382, 43 S. E., 119	29

Supreme Court of the United States

OCTOBER TERM, 1930

No. 600

ATLANTIC COAST LINE RAILROAD COMPANY
Petitioner,

—vs—

J. L. POWE, Administrator of George A. Marshall, Deceased, - - - - *Respondent.*

BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

STATEMENT OF CASE.

This case was before this court on a writ of error to the State Court (Atlantic Coast Line Railroad Company vs Tyner, 278 U. S. 565) and the judgment below was reversed by this court and a new trial ordered.

1. On Chicago M. & St. P. R. Co. vs Coogan, 271 U. S. 473 (on the question of evidence).

2. On Southern P. Co. vs Berkshire, 254 U. S. 415;

Ches. & O. R. Co. vs Leitch, 276 U. S. 472 (on the question of assumption of risk).

3. Gulf, C. & S. F. R. Co. vs Moser, 275 U. S. p 133 (on the question of the measure of damages).

The case has been tried and comes up again on a petition for a writ of certiorari. No question on item 3 above, on the measure of damages, is raised. The only questions remaining are those that still come under the grounds 1 and 2 above.

At the first trial, plaintiff undertook to prove the case principally by a railroad witness, who however, according to the opinion of this court, did not testify to enough to take the case out of the Coogan case or out of the Berkshire and Leitch cases.

Realizing that the case had to be tried and the issues met within these cases a radical departure was made in the character and method of proof at the second trial.

Plaintiff's intestate, George A. Marshall, was a switchman, employed by appellant to work *in its railroad yard.* He was killed while on duty on a sudden call to go out on the main line to clear up a wreck. (T. R. f. 46).

It was three o'clock in the morning of January 5th, 1923, and was dark and foggy, (T. R. ff. 13 and 94).

Marshall was married; was twenty-seven years old; was in good health. He left a widow and three children, one unborn at the time of his death. (T. R. f. 41, 42, 43). He was a good provider; made One Hundred and Eighty ($180.00) Dollars per month (T. R. f. 43, 44); paid all the family bills, and after doing so turned over Thirty or Forty Dollars per month to his wife. (T. R. f. 52). His dead body was found between twenty and twenty-five feet from a semaphore post where it lay when the Coroner

reached the scene (T. R. f. 92, 93). The Coroner found the mark where presumably he struck the semaphore post (T. R. f. 91, 92, 93) where the dew was brushed off (Id.) The Coroner subsequently held an inquest (T. R. f. 94) but not an autopsy (T. R. f. 99) and did not examine his body to see what was the cause of death (Id.). The exact cause of death being one of the missing links at the first trial, the body of Marshall was exhumed between the first and second trials, that is in February, 1929 (T. R. f. 109). Dr. J. L. Powe, his family physician, then performed an autopsy. He knew Marshall and knew he was examining the skull of George A. Marshall (T. R. f. 112). The skull was produced in court. The back of the head was crushed in (T. R. f. 113) and the condition of the skull indicated that he had received a terrific blow on the back part of the head (T. R. f. 117). His neck was broken and his spine was "disarticulated from it" (T. R. f. 118). The identity of the body was proved by both the Doctor and the Undertaker (T. R. f. 141). The condition of Marshall's skull could not have been caused by falling from the train (T. R. f. 121) but it could have been caused by coming in contact with the semaphore (T. R. f. 118). The speed of the train, as told by a witness who qualified as an expert, was between twenty-five and thirty miles per hour. (T. R. f. 153). This witness knew the location of the semaphore post (T. R. f. 145) and he assumed the speed of the train from his knowledge of how a body would be thrown after hitting the semaphore post to the point where it was found by the Coroner (T. R. f. 151). This expert witness knew the duties of a switchman (T. R. f. 155); that it was a switchman's duty to be on the ladder protecting the company's rolling stock and watching the brakes if they were out of order (T. R. f. 157); that the rocking and rolling of the train going twenty to thirty miles an hour would sway the box car from 10 to 16 inches (T. R. f. 154). A few hours after the accident there were blood stains on the north side of the semaphore casing (T. R. f. 193). The semaphore post where Marshall's body was found was on the "main line" on the Atlantic Coast Line (T. R. f. 146). Before the second trial actual

measurements were taken by a civil engineer who found that the fatal Semaphore (3911) was only four feet five and one quarter inches from the outer edge of the rail (T. R. f. 71), whereas the semaphore post just south of it was five feet nine inches from the rail, and the one just north of it was seven feet six and one-half inches from the rail (T. R. f. 73, 74, 75) and the one just north of that six feet seven and three-quarter inches (1d.). They are now in the same position as at the time of the accident. (T. R. f. 192). None of this evidence either as to the cause of death or the unusual location of the semaphore was adduced at the first trial. (It will be shown how great is the importance of this new evidence when it comes to considering the cases under which this case was sent back for a new trial and that the evidence was put in to meet clearly the Coogan case on circumstantial evidence and the Berkshire and Lietch cases on assumption of risk. And this evidence, as we will show, brought the case within the rule in Central of Georgia, Ry. Co. v. Davis, 7 Fed. (2nd Series) 269 which rule was recently in effect sustained by the United States Supreme Court by denying a writ of error,)

There was no eye-witness, but the defendant company filed its answer and set up in one of its defenses that it was the Semaphore that brought about the death. This admission of the answer was not proved *as a fact* at the first trial.

In putting in its answer, presumably based upon the testimony of its own witnesses, which it had under its control, defendant set up the cause of death, and while it made every effort to strike out from the record and take from the jury consideration of its own sworn admission, it was not permitted to do so (T. R. f. 216).

At the first trial, the force af the admissions of the answer was overlooked and the plaintiff proceed to prove the case by available evidence which this Court held insufficient.

The proof offered of the fact admitted in defendants

answer was not the whole of paragraph seven as petitoner contends. The transcript of record erroneously sets out (T. R. f. 213 et seq) the whole of the paragraph as having been put in evidence. This error was corrected by the Court Stenographer before the case was argued in the Supreme Court of South Carolina. The exact words put in evidence, bracketed in the copy of answer used at the trial and given to the Court Stenographer who copied them were:

> "Further answering said complaint****this defendant alleges that the injuries and death of the deceased were due to, and caused by the****deceased****in leaning outward from the ladder of said freight car so far as to bring his body in contact with the said semaphore."

The court allowed this fact to go in evidence. Defendant made no motion for a nonsuit. Such a motion *was* made at the first trial. The defendant however merely put in evidence two circulars issued by the Railroad Commission bearing on minimum distance, announced that it would introduce no evidence on the plea of cotributory negligence and closed its case. It is very important to recall this as under point II the petitioner intimates that the whole of paragraph seven of the answer was put in evidecne.

The defendant after putting in only the evidence of the rules of the railroad commission moved for a direction of verdict, which was refused.

BRIEF FOR RESPONDENT

This Court did a significant thing in sending the case back for a new trial. Instead of ordering judgment for defendant, it ordered a new trial under certain suggested authorities. At the first trial petitioner moved for a nonsuit, and the opinion of this Court means that it should have been granted. We must have proved our case at the second trial, for with the lines of proof already laid down by the Su-

preme Court it could have been readily shown on motio for nonsuit (if such had been the case) that we had aga failed. It must be obvious that we had met the controllin cases.

POINT I.

DISCUSSION OF ASSUMPTION OF RISK

In the Berkshire Case, cited by appellant, the risk wa obvious and well known. But the semaphore post in th case was a veritable death trap and was a hazard of whic not only plaintiff did not know, but had no means o knowing.

It was an extraordinary risk which was not obvious i any sense of the word and which he could not, therefor have assumed. Whatever little railroad experience Marsha had was not at the point where the accident occurred. He ha had two years experience at Florence, one hundred mil from this point. The testimony is that for "about thre months before the accident he worked in Charleston, b was called off that night on a wreck when he got killed. His body was found at the semaphore post on the *main lin*

The witness McCrady, a high-class civil engineer of Cha leston, was employed to take exact measurements on th location of the semaphore posts. He did not testify at th first trial. At the first trail, there was no testimony diffe entiating the case from the Berkshire case and bringing squarely within the case of Central of Georgia Ry. Co. Davis, 7 Fed. (2nd) 269. While it was shown conclusivel at the first trial by actual tests that the head of a man's bod "while he was leaning outward from the ladder of sai freight car" would strike against the semaphore post, ther was nothing to show that the particular semaphore pos was much closer to the track than any semaphore post nort or south of it.

The testimony of Mr. McCrady is that semaphore 3916 next south of it is six feet seven and three quarters inches from the track. A man could ride up and down night or day stretching himself to the utmost and could not possibly come in contact with that semaphore. And so of semaphore 3906, just north 3911 where Marshall was killed. That semaphore is five feet nine inches from the rail. As the test showed that only a man's head, stretched as Marshall's body was on the train that night, could reach as far as semaphore 3911, it is perfectly clear that at 3916 and 3906 Marshall would have been safe. Semaphore 3911 is so jammed up against the track that it was not safe for a man to work there. Semaphore 3911 unlike all the other semaphores, was placed just exactly where it would kill a man, especially at three o'clock in the morning and at a place with which he was unfamiliar; where he had been sent to do emergency work clearing up a wreck, and because while clearing up that wreck, the brakes of the car having gotten out of order, he was straining himself on the ladder in the interests of the master looking at the brakes. There was no reason why the company had to have the trap there. The jury knew and the photographs showed that the right of way was wide enough by moving the tracks to have permitted safety. It would have been an expense when the semaphores were installed to move the tracks over. The tracks had been put down before semaphores were invented, and it would have required moving over the tracks at this point to make way for the semaphore. The company preferred to gamble what a life might cost against the cost of moving its tracks. If the semaphore was a death trap, it would be cheaper to pay damages; and at any rate maybe nobody would ever be killed. Of course railroading is a dangerous occupation, and if semaphores were necessarily and invariably placed at that distance from the rail such as mail cranes are, that would be a risk which an employe would assume.

As there was no testimony at the first trial on the location of Semaphore 3911, for all this Court knew, the

erection of semaphores at the distance of four feet ten inches might have been necessary as a uniform custom. The case was sent back under the Berkshire case which held that "the company was not responsible for the death of an engineer killed by coming in contact with a mail crane *erected under conditions imposed by the Post Office Department.*" The company had no choice. The court said in that case:

> "In order to have *uniformity,* the Post Office Department fixes the distance of the crane from the equipment, and the length of the hooks, so that in the language of a witness for the plaintiff "the same hook that will take a sack off a train in Arizona or New Mexico will take it as it goes through eastern Kansas'. The evidence was all to the effect that this crane stood at the same distance as all the others along the road."

In other words, Berkshire's intestate could not recover because he knew or should have known as an experienced engineer that throughout the length and breadth of the land under the requirements of the Post Office Department mail cranes were placed at a certain elevation from the ground at a certain distance from the track, and this for the purpose of assuring "uniformity".

A mail crane would be a useless thing unless it were placed close enough to the track for service, but the same court held in the same case:

> "However it may be *in other cases* where there is more or less *choice* as to position, this is true as to the postal crane****In short, it would be impossible to use the contrivance with absolute certainty that no accident would happen if a man put his head out at the wrong moment."

Now in the case at bar, not only did the railroad company for its own economy violate the rule of uniformity,

but had actually put the semaphore post at a place where it was not necessary to put it if it had just moved the tracks over, and where it served a less useful purpose as a signal by being close to the track. Proof that signals are best located further away from the track is shown by the location of all the other semaphore posts. Unless the employee were advised that a certain post was as close to the rail as this one was, even as an experienced railroad man he would assume that there was no semaphore post as close as 3911, because that would not be where it would have to be in order to give the best service. The vital and controlling distinction between proof of negligence at the first trial on the question of the semaphore post and proof at the second trial, is that at the first trial no proof was offered on the question of lack of uniformity.

So much for the Berkshire case, as distinguished under the proof at the second trial. Again let us repeat that this was so different from the proof at the first trial that appellant did not move for a nonsuit. He must have thought this evidence sufficient to take the case to the jury on the point or he would have made his motion. He attempted to rebut it by putting in and proving the rule of the Railroad Commission fixing minimum clearances, which, after all, only went for what it was worth. It is quite unnecessary to repeat that this Circular of the Railroad Commission in no way absolved the defendant from negligence under all the circumstances, which was a matter for the jury to decide. If the defendant company had violated the order of the Railroad Commission and put the semaphore post closer than prescribed, that might have been held to be negligence per se. This is the principle set out in Frese vs. Chicago B. & Q. Ry. 236 U. S. p. 1 cited by petitioner. Because it did not violate the rule, but did nevertheless place the semaphore post within the danger zone we maintain left purely a question for the jury.

In the case of Toledo St. L. & W. Co. against Allen, 276 U. S. 165, 72 L. Ed. 513., (cited by petitioner) the plaintiff was injured in the railroad yards where he had

worked a year and a half checking cars during the night, the yards not being artificially lighted. It was his duty to dodge in and out of the cars and to stand in between tracks while trains were passing, and it was of course a highly dangerous branch of railroading. He was held to have assumed the risk. The Court said:

> "In any event plaintiff assumed the risk. He was familiar with the yard and the width of the space between the tracks and knew that cars were liable to be shunted without warning to him. The dangers were obvious and must have been fully known and appreciated by him" citing Boldt vs. Pen R. Co. 245 U. S. 445; 62 L. Ed. 385; and Ches. & O. R. Co. vs. Nixon 271 U. S. 219; 70 L. Ed. 519; and Randall vs. B. & O. R. Co. 109 U. S. 478; 27 L. Ed. 1003; and Tutle vs. Detroit G. H. & M. A. Co. 122 U. S. 189; 30 L. Ed.—

It was just the reverse in the case at bar. The decedent was not familiar with the location and he had no reason to suppose that there was any risk of a semaphore post being where it was.

As the case was sent back mainly on the point of assumption of risk under the Berkshire case and the Leitch case, we have quite naturally studied these two cases very attentively. The Leitch case deals with facts which are substantially identical with the facts of the Berkshire case. They are as like as peas in a pod. The Leitch case follows the Berkshire case foot for foot on all fours. Appellant however seems to have overlooked the Davis case as he does not cite it.

The denial of the writ in the Davis case means that neither the Berkshire nor the Leitch case is applicable to such a case as the case at bar, under the facts as brought out at the second trial.

The Berkshire and Leitch cases stand. The Davis case stands also, and it stands of course because this Court

clearly distinguished it from the Berkshire case as it will now we trust distinguish the case at bar. The Davis case is so applicable to ours that we may be pardoned for quoting it rather freely. The statement of facts of the Davis case unanimously decided by the C. C. A. (Central of Georgia Ry. Co. vs. Davis, 7 Fed. (2nd) 269) might almost have been written for the case at bar. That Court speaking said:

"This was an action under the federal Employers' Liability Act (Comp. St. 8657-8665) to recover damages for the death of Jack Davis, who at the time of his death was employed as a flagman on a passenger train of the plaintiff in error, which was proceeding from Columbus, Ga., to Birmingham, Ala. Davis was killed as a result of his person coming in contact with a mail crane platform at Arkwright, a station on plaintiff in error's railway. The case went to the jury on one count of the complaint, which alleged that the employer negligently caused or allowed said mail crane platform to come in contact with said deceased, and to which the employer pleaded the general issue in short by consent, with leave to give in evidence any matter which, if well pleaded, would be admissble in defense of the action. An exception was reserved to the court's refusal to give a requested charge to the effect that, if the jury believe the evidence, they must find for the defendant.

"Evidence adduced was to the following effect: At the time of his death Davis had been a flagman on the same train for several months, and had passed Arkwright in the daytime each day during that time. At Arkwright the employer's tracks, running north and south, cross the tracks of another railway company. The stopping place for discharging passengers from the train going north was south of the crossing, and passengers alighted on the east side of the employer's track. Pursuant to his duty Davis alighted at that place and

assisted passengers on and off the train. While Davis, after the train got in motion again, WAS STANDING ON THE BOTTOM STEP OF A PASSENGER COACH, FACING TOWARDS THE REAR OF THE TRAIN, AND STOOPING OR LEANING AND LOOKING UNDER A COACH, TO DISCOVER THE CAUSE OF A NOISE THAT WAS HEARD, HAVING HIS HEAD SEVERAL INCHES OUT FROM THE SIDE OF THE COACH, HE WAS STRUCK BY THE MAIL CRANE PLATFORM, which was on the same side of the train as that on which passengers got off and on. That platform was north of the crossing. It was built around the bottom of a mail crane, and its purpose was to provide a place for persons to stand on while hanging a mail sack on the arm of the crane. It is about 4 feet high, and was 3 or 4 inches from the the outside of a passing coach. OTHER MAIL CRANES ALONG THE LINE DAVIS SERVED ON WERE IRON CRANES, WITH LADDERS, AND DID NOT HAVE A PLATFORM AROUND THEM."

(Capitals ours).

The Davis case arose in the District Court of the United States for the northern district of Alabama. The jury found for the plaintiff and the case went up on appeal to the Circuit Court of Appeals. Affirming the decision and judgment of the lower court, the Circuit Court of Appeals said:

"The above mentioned ruling is complained of on the ground that under the undisputed evidence the deceased assumed the risk due to the presence of the mail crane platform at the place above indicatd. The evidence warranted a finding that the employer was chargeable with negligence in permitting that object to be unnecessarily near the track."

"In order to charge an employe with the assumption of a risk attributable to a defect due to the employers' negligence, it must appear, not only that he knew (or is presumed to have known) of the defect, but that he knew that it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it" (Gila Valley Ry. Co. vs. Hall 232 U. S. 94, 102, 58 L. Ed. 521).———

"We are of opinion that under the circumstances disclosed by a phase of the evidence it was properly a question for the determination of the jury whether the deceased did or did not know of the location of the mail crane platform and of the danger therefrom to trainmen on passing trains. The evidence as to the circumstances under which the deceased daily passed that object was not such that it required the inference that he knew of its location and realized the danger therefrom to one who is passing on a train has the whole or part of his body out from the side of a car. *In passing on the question whether the deceased did or did not know of and appreciate the danger the jury might properly be influenced by the considerations that the mail crane platform in question was the only structure of its kind on the line on which deceased served;* that at the times when he had an opportunity to observe it he probably was engaged in assisting passengers off and on the train, and in performing other duties of a flagman incident to the stopping and starting of a train, and, so far as appears, was not charged with the duty of looking out ahead for obstructions near the track; and that, if he casually saw the platform quite a distance from him he, without being negligent, might have failed to realize how far it was from a passing car. *The case is quite different from So. Pac. Co. vs. Berkshire* 254 U. S. 416; 65 L. Ed. 335. In that case it was held that an experienced locomotive engineer who had operated many times over a railroad where

mail cranes were uniformly set up close to the track was to be presumed to have known the danger of being struck when leaning from his cab window while passing a mail crane. It is to be inferred, that, in reaching the conclusion in that case that the engineer, "perfectly well knew of the existence of the crane where it stood," the court was influenced by the considerations that he was charged with the duty of keeping a lookout ahead and that there was uniformity in the location of mail cranes with reference to the track traversed by the engineer. Pertinent authorities support the conclusion, that in the instant case it was not a necessary inference from undisputed evidence that the deceased while performing his duties as a flagman, must have become aware of the location of the mail crane platform with reference to the track and must have realized the danger therefrom (*Tex. & Pas. Ry. Co. vs Swearingen* 196 U. S. 51; 49 L. Ed. 382; *Tabor vs Davis* CCA 280 F. 612.) It follows that the above mentioned ruling was not erroneous". (Italic Ours).

When this Court after having decided the Berkshire case denied the Writ of Certiorari in the Davis case, (269 U. S. 579; 70 L. Ed. 422) it of course meant to approve the reasoning of the Circuit Court of Appeals which had expressly considered the Berkshire case. The facts in the Davis case were stronger on assumption of risk than in the case at bar. The accident happened in bright daylight—to a man accustomed to passing a mail crane every day for several months. Ours was a case of a man whose duty had never called him to the location until when at three o'clock of a foggy winter morning he was picked up in an emergency to clear up a wreck. The only previous experience he had had on the main line with semaphore posts left him to believe, as was the case in all but the fatal semaphore post, that it was perfectly safe for him to swing out from the car while watching his defective brake.

POINT II.

DISCUSSION OF SUFFICIENCY OF EVIDENCE

The case of Chicago M. & St. P. R. Co. vs. Coogan 271 U. S. 473 of course did not hold that it woudl thereafter be impossible to prove a case except by direct evidence. The use of circumstantial evidence was still sanctioned. That case only held that the circumstances must themselves be proved and not presumed, and that doctrine was not new.

We submit that on the second trial of this case, we have adhered strictly to the rule and that we have *proved* the missing links.

In the Coogan case a brakeman was killed. The question was, how did it happen, not whether the train had actually killed him. That was undisputed. The Court said p. 476: "The precise question of the decision is whether the condition of the pipe caused or contributed to cause the death of the deceased." The act of negligence complained of was that the company had allowed an air pipe to get out of order, and to remain out of order, and as Coogan's body was found in the neighborhood of the air pipe a very elaborate theory was built up after several days to the effect that Coogan's foot was somehow entangled between the pipe and the rail. Had the defendant company by having committed the act of negligence (admitted in the decision as having been proved) of leaving the defective pipe where it was caused the death? Speaking of the defective condition of the pipe, the Court said: "It had been in that condition for some months. The evidence is sufficient to warrant a finding that there was a breach of duty in this respect". The only evidence on the "precise question of the decision," which was *how* he was killed, was indeed highly remote and speculative.

The evidence did not present itself at the time Coogan's body was found. Coogan's leg was cut off and

he was found lying by the track. That was circumstantial evidence. It was so strong as proving that he was killed by the train that there was not even any question raised on the point. That, however, did not mean negligence. He might have been killed by his own fault. In looking around for proof of negligence, it was discovered "some days after the accident" that "the outside of the counter of the left shoe was scratched and showed a marked rounding depression parallel with the sole and just above the heel, and this condition was first noticed some days after the accident. In the meantime the shoes had been left in a garage and no attention was given to them. The depression in the counter was not so clear at the trial as when first noticed" (271 U. S. 476). An effort was made to build up a case on this, and it can be understood how this Court, having the power to "examine the record and if as a matter of law the evidence is not sufficient to sustain a finding that the carriers negligence was the cause of death will reverse the judgment" exercised that power and reversed the judgment. This court held that the evidence left the matter "in the realm of speculation and conjecture" which the court decided was "not enough." Left what in the realm of speculation and conjecture? Whether Coogan was killed *because the heel of his shoe was caught* between the pipe and the rail. If there was not enough evidence to prove that very point the plaintiff was out of court. If when Coogan's body was found his heel had been fastened between the pipe and the rail and his leg had been severed from his body, that would still have been circumstancial evidence. But it would not have been "speculative," because the pinioned heel would tell a clear story. Certainly in that event the Coogan case would never have been reversed. The circumstance would have been "proved" and not "presumed."

In the instant case, this Court found nothing in the record of the first trial to support the plaintiff's theory that Marshall met a violent death. By some strange omission the coroner had not held an

autopsy. It had been taken for granted that he was killed by the train. The Coroner was called, and although he at once looked for and found the semaphore post and found on the semaphore post certain telltale marks perhaps, he simply took charge of the body and turned it over to the Undertaker without going into the positive cause of death. Under those circumstances Counsel could well raise before this Court the actual question that for all anyone knew Marshall may have dropped dead. It would have been absurd to raise the question at the trial. But it was not actually settled by the record, and this Court went by the record. However, at this trial a great deal more care was taken to prove by circumstantial evidence and put in the record (not conjectural or speculative) proof of how Marshall actually came to his death.

We proved that Marshall would not have come to his death but for the semaphore post; that the semaphore post would not have caused his death except for the negligence of the defendant company in placing it too close to the track (closer than all other semaphores) and in requiring Marshall, whose duty called him to work in the yard, suddenly to go out and work on the main line where he had no experience and when he had every reason to expect that there was no unusual danger arising from obstructions near the track.

An autopsy was held before the second trial. Marshall's body was disinterred; his skull was produced in court shattered into bits, crumpled up like an egg-shell, which Dr. Powe testified could not have happened by contact with the ground and must have been caused by contact with such an object as the semaphore post. This testimony first of all silenced the suggestion that Marshall had died from natural causes. He was twenty-seven years of age and was in the prime of health. It was always a farfetched suggestion that he might have just dropped dead at the semaphore post. But in the light of Dr. Powe's autopsy death from natural causes went out of the case.

Having then definitely settled that his death came from external violence, what are the further circumstances? That his body was found right by the semaphore post; that the Coroner at the spot, at the time, looked around for the cause of death and found that the semaphore post had signs of where the body had struck (T. R. f. 90). Witnesses testified that there was blood on the semaphore post. There was still only circumstantial evidence that he did come to his death by the semaphore post.

Until the second trial, the plaintiff did not avail himself of the benefits of the rule of evidence as to the uses of *facts* admitted in an affirmative defense, the allegations of which are admissable, not to prove negligence, but for their value as facts, and this notwithstanding the affirmative defense might afterwards be withdrawn or stricken out.

However strong the circumstantial evidence was of the manner in which Marshall met his death, admissions of the parties have always been taken as stronger than either direct or circumstantial evidence, in fact as conclusive. The object of pleadings is to narrow the necessity of proof. The defendant had in its posession all the light bearing upon the death of Marshall. It had the car on which he was killed, which had the defective brakes; it had the track and the semaphore, but above all it had in its employ the train crew. It has all these now. The train crew is so much under its dominion that although they were the nearest to actual eye-witnesses of Marshall's death, our experience in using one of them at the first trial was a warning to us and we did not use him at the second. However, the defendant dared not risk the danger of using them. What implication may be gathered from this has been recently passed upon by this Court. (Mammoth Oil Co. vs. United States 72 L. Ed. 15.) But at any rate it based its defense upon them as set out in the answer and this is as potent as if all their witnesses had gone on the stand and sworn to them.

It was ncessary for plaintiff to use one of them at the first trial. While he proved enough to satisfy the jury notwithstanding he was a hostile witness ,he was not used in the second trial because in the light of Dr. Powe's and Mr. Tyner's testimony he was not necessary. The defendant, of which this Court will take judicial notice we submit, is required under the rules of the Interstate Commerce Commission to conduct an immediate inquiry into all accidents. The defendant naturally wished to avoid liability. Yet when the defendant, building its case out of the facts within its power, probably by testimony of the train crew, (while it denied negligence and each and every allegation "not specifically admitted") set up its defense and specifically alleged that it was "in leaning outward from the ladder of said freight car so as to bring his body in contact with the said semaphore ****" that Marshall was killed. A jury in passing upon testimony has no interest in giving it weight unduly for the plaintiff or defendant. It sifts the truth. It has a duty to perform and no liability to escape. The defendant itself had only "circumstantial' 'evidence in its possession. In framing its answer it had also every motive to so interpret this evidence as to absolve itself if it could from liability and find any other hypothesis upon which to account for Marshall's death. Unless convinced by that evidence that Marshall came to his death by being struck against the semaphore post it could and would have denied it. It denied negligence, but it admitted the *fact* that it was the semaphore that killed him. This was a fact that would not down, from the investigation of the train crew on the spot, from the investigation by the coroner, from the condition of Marshall's broken neck and shattered skull, from the blood on the semaphore, from the finding of the body close by the semaphore, from the testimony of the conductor who saw Marshall swinging out on the ladder watching the brakes, from all the facts and a knowledge of the circumstances peculiarly in the posession of the defendant. It was so strong that under its compulsion

defendant set it up in its sworn answer. Defendant sought in its pleadings to take advantage of that fact by alleging that he was acting against orders. We had not alleged exactly in the complaint that "Marshall was leaning outward from the ladder of said freight car so far as to bring his body in contact with the said semaphore." That "positive affirmation" (the term used in Blake vs. So. Ry., 126 S. C. 407) could only have been based upon experiments which defendant conducted by placing the car back at the semaphore and putting a man about Marshall's size on the ladder and putting him through the physical tests with the semaphore. So the jury thought, as the case was argued. We knew that he had been killed by the semaphore and alleged it in our complaint, and that knowledge was baesd on all the facts and circumstances accessible to us, but only the railroad company was in a position to experiment with and prove facts before it put in the answer.

The cases of A. C. L. Railroad vs. Davis, Administrator, 279 U. S. 34; 73rd L. Ed. 601;—Gulf M. & N. Railroad Co. vs. Wells, 275 U. S. 455; 72 L. Ed. 370;—A. C. L. Railroad Co. vs. Driggers, 279 U. S. 787; 73 L. Ed. 957, cited by appellant, do not affect the force of our argument, but simply fell within the doctrine of law reannounced in the Coogan case, that this Court will review evidence and pass upon its "sufficiency" etc.

Petitioner in his brief below at folio 66 argues that our evidence "taken at the second trial is much less definite as to the cause of the decedent's death than it was at the first trial." His ground for this can only be that because we failed to put up his own railroad witness whom we used at the first trial, our case was deficient. This Court held that this witness's testimony at the first trial and all other testimony put together failed to prove a case. Accepting that as the gauge of battle, we did not put up useless evidence again; we did not depend upon mere quantity of testimony. We carefully culled

out everything but testimony which went right to the heart of the case to take it out of the Coogan case.

We do not think the trial court erred in admitting that part of defendant's answer as alleged exactly how the decedent came to his death. If this was not error; if it was good law to prove that the defendant itself swore that Marshall came to his death on the ladder of the train while he was leaning outward "so far as to bring his body in contact with the semaphore post" the case is at once taken out of the field of "speculation". Petitioner realizes this and labors at folio 101 of his brief below, stating that he had clearly shown **** that the trial court committed error". Well fortunately for us the authorities are just the other way. If it is borne in mind also that the admission in the answer was only introduced for proving *facts*, there is nothing in petitioners argument that although defendant did admit this fact the force of it was completely destroyed by the allegations of contributory negligence with which it was coupled. The introduction of this *fact* had nothing to do with whether or not Marshall was right or wrong when swinging on the ladder, but only to show that he was on the ladder and was killed by the semaphore.

The answer denied each and every allegation of the complaint "not hereinabove or hereinafter specifically admitted." It has been held that the qualification "not hereinabove specifically admitted" relieves the answer of the force of a complete general denial and leaves the implication that the answer in some other part and form intends to make further admission. (Blake vs. Southern Ry. Supra.) The defendant's answer sets up contributory negligence for the purpose, and only for the purpose, under the Employers Liability Act, of mitigating damages. Contributory negligence is no longer under the Act a complete defense. In setting it up, it was necessary to allege facts upon which contributory negligence was based. The trial court was of the opinion that the plead-

ings in the case were a part of the case and that the jury could take this allegation of fact in defendant's answer as an admission in the pleadings without the formality of putting it specifically in evidence. Nevertheless, under a line of cases holding otherwise, the plaintiff had the answer produced and placed certain bracketed sections of it in proof, as a part of the testimony in the case.

> "There is a disagreement among the cases as to the necessity of introducing a pleading in the case in which filed, in evidence, as other evidence is offered, before it may be made use of as proof. By far the greater number of jurisdictions follow the rule requiring pleadings containing admissions against interests to be offered in evidence before being made use of as proof of the admissions contained therein. This rule applies alike to the pleading which remain the pleadings in the case, and the pleadings which are abandoned or superseded. In jurisdictions in which admissions contained in the pleadings upon which the case is tried are held not to constitute proof of the facts admitted but to dispense with proof thereof, there is a distinction made between the necessity of offering in evidence abandoned pleadings upon which the parties go to trial." (A L. R. 14, p. 98, 90).

The defendant offered no proof on the plea of contributory negligence.

The plaintiff had no control over the defendant's suggestion that contributory negligence went out of the case, but took the ground that even if the defendant wished to deprive itself of the benefit of the defense it could not deprive the jury of the benefit of the facts. Once admitted they could never be erased.

The Supreme Court of South Carolina, in the very recent case of Blake vs. Southern Railway, Supra, in an opinion concurred in by the whole court written by Cothran, A. J. (who wrote the dissenting opinion in the case at bar), says:

> "The defendant, however, insists that the admission which occurs in the second defense cannot be held to have destroyed the general denial in the first defense. There are two reasons why this position cannot save the defendant:
>
> (1) It is not simply an admission but a specific and positive affirmation inserted for the protection of the defendant. The defendant cannot limit its beneficial effects to its own purposes.
>
> (2) The so-called general denial in the first defense is limited by its terms to such allegations as may not "hereinafter be admitted. Those that are admitted, including the allegations of the interstate employment are excepted from the force of the general denial by its terms."

It is not amazing to us that four out of five of our State Supreme Court now disagree with Justice Cothran in his labored effort to reverse himself. The Blake case was a case directly sustaining the principles for which we contend. Our case is even stronger. That case turned upon the defense of assumption of risk which may be termed an inconsistent defense, unlike the defense of contributory negligence which was not an inconsistent defense even before the passage of the Employers Liability Act and which is now no defense but only matter of mitigation.

In the Blake case, the very able attorneys for the Railroad Company cited the same authorities which have been cited by the petitioner in the case at bar, but our Supreme Court passed them over in rendering its decision, from which the above extract has been taken. They were evidently inapplicable.

The point was also decided in the case of McJimpsey vs. Southern Ry., 89 S. C., 125 where this court says:

> "The complaint alleged that defendant was successor of the Spartanburg and Asheville Railroad Company and owner of its franchise, rights of way, tracks, locomotives and passenger cars, said tracks extending from Spartanburg, S. C., to Asheville, N. C., and that plainff became a passenger on the cars of defendant at Biltmore, N. C. The answer did not specifically deny the allegations, but stated: "It denies every material allegation of the complaint." It is extremely doubtful whether this constitutes a good general denial, because of the qualification, leaving it uncertain what the defendant considered "material" 1 Ec. Pl & Pr. 782. But passing that by, as no motion to make the answer definite was made, we notice the third allegation in the answer: "Defendant further alleges that the plaintiff in getting out on the step of one of its cars and in attempting to jump from the train while in motion, and in holding on to the hand-holds while the train was in motion, assumed all the risks incident to his so doing." Here we have a statement by defendant that the injury occurred on the cars of the defendant, and whether we view this as an admission, or as warranting an inference that the allegation of the complaint in this matter was not considered material by the defendant, and, therefore, not intended to be denied, we cannot hold that there was such a total failure of evidence on this point as to warrant direction of verdict for defendant.

In the case at bar the language which we introduced as proof "is not simply an admission but a specific and positive affirmation." We had alleged in our complaint (p. 5) that decedent "was struck by said signal device or obstruction and thrown from his train and so badly injured as to cause his death soon thereafter." In its answer the defendant alleged that the decedent came to his death "in leaning outward from the ladder of said freight car so far as to bring his body in contact with the said semaphore."

There is a Federal case cited by the Petitioner, Glenn vs. Sumner, 132 U. S. 152. The petitioner seems to stop there, without following the case down to the later case of Smith vs. Gale 144 U. S. 509, 36 L. Ed. 521, (distinguishing the case of Glenn vs. Sumner) where at pages 524-5 the court says:

> "It is true that when a general denial is pleaded in connection with the special defense of new matter, or two inconsistent defenses are set up, the admissions in the one cannot be used to destroy the effects of the other.
>
> (Glenn vs. Sumner 132 U. S. 152, 157 33 L. Ed. 301).
>
> "In this case, however, there are no inconsistent defenses; the general denial itself is qualified by a denial of each and every allegation of the complaint "not expressly admitted," the defense is, in reality a single one *****".

The answer in the case at bar denied 'each and every other allegation in said complaint not hereinabove or hereinafter specifically admitted" and is in the language of this Court in the case just cited, a case where "the general denial itself is qualified by a denial of each and every allegation of the complaint 'not expressly admitted'."

Petitioner also seems to have failed to discover a more recent Federal case, Lee Line Steamers vs. Robinson, 218 Fed. 559, where at p. 562 the Circuit Court of Appeals, again clearly distinguishes the Glenn case and unanimously upholds the doctrine for which we contend. This case decided in 1914, long after the Glenn case was never appealed to the Supreme Court, undoubtedly because of the Gale case distinguishing the Glenn case. This seems to be the established law in the Federal jurisdiction. In the Lee Line case the Court said at page 562:

> "We have seen that defendant filed two pleas, one of not guilty, and the other of justification. It is true that, where the law authorizes a defendant to set up several pleas, he may use each plea in his defense, and the admissions unavoidably contained in one cannot be used against him in another. Glenn vs. Sumner, 132 U. S. 152, 127, 10 Sup. Ct. 41, 33 L. Ed. 301. But this is so only where the defenses so made are inconsistent. Smith vs. Gale, 144 U. S. 509, 524, 12 Sup. Ct. 674, 36 L. Ed. 521. In the instant case the defenses are not inconsitent; the denial of the first plea is explained and necessarily qualified by the second; in the latter the defendant adopted the act of its servant as its own and as one of self-defense; and if that had been shown to be true it would have relieved the defednant and its servant alike of liability. N. O. & N. E. Railroad Co., vs. Jopes, 142 U. S. 18, 25, 27, 12 Sup. Ct. 109, 35 L. Ed. 919. Now, under the pleadings and the concurring testimony produced by the parties, the case stood thus: Passenger and carrier, and injury to the former inflicted with a knife by a servant of the latter in the ganway of the freight deck, at a time when this servant and others of his class were on that deck under special call to the performance of duty, with an issue only as to blame for the injury; and it is constantly to be remembered that upon this issue the defendant was seeking through a plea of

self-defense to excuse its failure to perform the high degree of care and duty it was under to protect plaintiff through his journey against misconduct and assault on the part of its servants. Steamboat Co. vs. Brockett, 121 U. S. 637, 646, 647, 648, 7 Sup. Ct. 1039, 330 L. Ed. 1049; Pendleton vs. Kinsley, 3 Cliff. 416, 426, 427, Fed. Cas. N. 10,922 per Justice Clifford, sitting as Circuit Justice; Alabama City, G. & A. Ry. Co. vs. Sampley, 169 Ala. 372, 377, 53 South, 142".

(218 Fed. p. 562).

This distinction was clearly laid down by the South Carolina Supreme Court in the McJimpsey case, Supra, where the answer denied every 'material allegation of the complaint' about which our Supreme Court said:

"It is extremely doubtful whether this constitutes a good general denial, because of the qualifications******"

And again in the case of Blake vs. Southern Railway ((Supra):

"The so-called general denial in the first defense is limited by its terms to such allegations as may not 'hereinafter be admitted'; Those that are admitted, including the allegations of interstate employment are excepted from the force of the general denial by its terms."

Applying the principle thus clearly announced by our court and the United States Supreme Court, the denial in the case at bar was a general denial only insofar as it was not qualified by facts and allegations thereinafter specifically admitted or denied.

Contributory negligence never was an "inconsistent" defense. But now,

"Under the provision of the Federal Employers Liability Act that contributory negligence is not a bar, pleas of contributory negligence pleaded in bar rather than in mitigation of damages, held defective" (Southern Ry. vs. Fisher 74 So. 580; 199 Ala. 377).

The defendant company by its plea of contributory negligence simply meant to say that it wanted the jury to decide, on the admitted facts constituting negligence, which was the more negligent of the two and to apportion damages accordingly. It put this plea in, therefore, not as an inconsistent defense but as a defense perfectly consistent with the acts alleged constituting negligence, but claiming that notwithstanding these acts it was entitled because of plaintiff's negligence to mitigation of damages. It certainly did not intend to deny that the facts upon which this plea was based were without reality and it cannot complain therefore that the jury was asked to accept them as true.

The North Carolina Supreme Court (Jones vs. Norfolk Southern, 97 S. E. 52), following a long line of decisions, in a late case brought under the Employer's Liability Act, passing upon the same question, said:

> "Defendant excepted further to the rulings of the court on questions of evidence: First ,that his honor allowed plaintiff to put in evidence a separate clause of section 5 of the answer, as follows:
>
> That in order to disconnect the said moving engine and car, it was necessary as a part of said operation to apply aid to the engine so as to slow the same down.
>
> "And further that he refused to permit defendant to introduce other portions of said answer materially affecting said admissions. In this connection, his honor offered to allow defendant in reply to intro-

duce the accompanying statement of this paragraph, as follows:

"That, pusuant to said purpose, the said engine and cars were proceeding along the track and in the usual and customary manner and the said engine was slowed down and the car uncoupled from said engine."

"The defendant declined and, in addition, offered in evidence the entire remaining portion of the paragraph and excepted to the ruling excluding the additional statement.

"It is the settled rule of procedure in this jurisdiction that a party may offer in evidence a portion of his adversary's pleadings containing an allegation or admission of a distinct and separate fact relevant to the inquiry and without introducing qualifying or explanatory matter, the rule being further to the effect that, in such case, it is open to the opposing party to introduce such qualifying matter if he so desires. Wade vs. Contracting Co., 149 N. C. 177, 62 S. E. 919; Sawyer vs. Railroad, 145 N. C. 24, 58 S. E. 598, 22 L. R. A. (N. S.) 200; Lewis vs. Railroad, 132 N. C. 382, 43 S. E. 119. A correct application of the principle is in full support of his honor's ruling on both questions. The part of paragraph 5 admitted was of a distinct and separate fact relevant to the issue. His honor offered to allow defendant to introduce in reply any accompanying allegations which could properly be said to qualify or explain the fact, and the additional allegations of the answer insisted on by appellant, averring contributory negligence by plaintiff, were in no sense qualifying or explanatory of the fact admitted and were therefore properly excluded."

In the case at bar the defendant expressly declined to put in any "qualifying matter", but attempted to withdraw his plea of contributory negligence and thus, as he thought not to "qualify", but to escape the facts of his own pleading.

In view of the foregoing we respectfully submit that the petition for the Writ of Certiorari be denied.

Respectfully submitted:

LIONEL K. LEGGE,
of Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 600.—October Term, 1930.

Atlantic Coast Line Railroad Company, Petitioner,
vs.
J. L. Powe, Administrator of George A. Marshall, Deceased.

On Writ of Certiorari to the Supreme Court of the State of South Carolina.

[May 18, 1931.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action under the Federal Employers Liability Act for causing the death of Marshall, the respondent's deceased. It has been before the Court after an earlier trial, *Atlantic Coast Line R. R. Co.* v. *Tyner*, 278 U. S. 565, and now is brought here again to review a judgment of the Supreme Court of South Carolina affirming a judgment for the plaintiff. — So. Car. —. The petitioner contends that it was entitled to have a verdict directed in its favor on the grounds that there was no evidence that it was negligent and that Marshall must be taken to have assumed the risk of the supposed cause of his death.

It may be assumed that Marshall, a switchman, was killed while on the outside of a moving car by being brought into contact with a semaphore near the railroad track. The only ground for charging the Company with negligence that we regard as material is the suggestion that the semaphore was too near the track. The general principles laid down with regard to mail cranes in *Southern Pacific Company* v. *Berkshire*, 254 U. S. 415, and *Chesapeake & Ohio Ry. Co.* v. *Leitch*, 276 U. S. 429, apply equally to semaphores. It is impracticable always to set such structures so far away as to leave no danger to one leaning out, and in dealing with a well known incident of the employment, adopted in the interest of the public and of the employees, it is unreasonable to throw the risks of it upon those who were compelled to adopt it.

The semaphore in this instance was four feet and ten inches at its base from the outer edge of the track and probably a little more

at four feet above the top of the rail. An order of the South Carolina Railroad Commission, made, as it states, in consideration of the safety of the public and employees of the road and of the necessity for employees to give and receive signals, provides that no structure be allowed nearer than four feet from the outer edge of the main or side track, measurement being made four feet above the top of the rail. It will be seen that the Railroad Company in this case more than complied with the order. It is true that four feet was a minimum distance, but it satisfied the requirement of the Commission, and it would be going far to say that the Railroad Company was not warranted in supposing that it had done its duty, so far as the Commission was concerned, when it put the semaphore four feet and ten inches away. Marshall from his previous experience probably knew of the semaphore as he was required to do by the rules of the road. It was shown that some other semaphores were farther from the track, but the circumstances do not appear, and there is nothing to show that in this case the petitioner could have made the position safer than it was, except by changing the place of the track. As remarked in *Southern Pacific Co.* v. *Berkshire*, 254 U. S. 415, 417, the question is not whether a reasonable insurance against such misfortunes should be thrown upon the travelling public through the railroads, but whether the railroad is liable under the statute according to the principles of the common law regarding tort. No negligence is proved against the petitioner. It is urged that a certiorari was denied in *Central of Georgia Ry. Co.* v. *Davis*, 7 F. (2d) 269, which seemed to qualify the doctrine of the *Berkshire* case. But "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States* v. *Carver*, 200 U. S. 482, 490.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.